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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]23

UNITED STATES, ET AL., APPELLANTS,

vs.

HENRY E. DRUM, ET AL.

No. [illegible]24

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC. APPELLANT,

vs.

HENRY E. DRUM, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED DECEMBER 27, 1960

PROBABLE JURISDICTION NOTED MARCH 20, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 608

UNITED STATES, ET AL., APPELLANTS,

vs.

HENRY E. DRUM, ET AL.

No. 609

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC. APPELLANT,

vs.

HENRY E. DRUM, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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[fol. 1] • • • •

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA

No. 8708 Civil

HENRY E. DRUM, N. C. NEWMAN, A. D. WOODARD, GEORGE F. DAVES, OSCAR DAVES, ARCHIE NORRIS, EUGENE WIGGINS, CHARLES MCGEE, TOD SHINN, OKLAHOMA FURNITURE MANUFACTURING CO., a Corporation, PLAINTIFFS

VS.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

COMPLAINT—Filed January 28, 1960

I

Oklahoma Furniture Manufacturing Company herein after called Company is a corporation organized under the laws of the State of Delaware with its principal place of business in Guthrie, Logan County, State of Oklahoma and within the Western District of Oklahoma. The individual plaintiffs are each citizens and residents of Oklahoma and the Western District thereof.

This action is brought under the general equity powers of the court to vacate, set aside, and annul orders of the Interstate Commerce Commission and to enjoin the Interstate Commerce Commission from enforcing or attempting to enforce said orders. The Court has jurisdiction under 28 USCA 1336, 1398 and 28 USCA, Sections 2321-2325.

II

The company's primary business enterprise is the manufacture of furniture which is accomplished at its only plant at Guthrie. In pursuing this primary business the [fol. 3] company transports its furniture as a private carrier from Guthrie, Oklahoma to points throughout the

United States. Raw materials are purchased for the company at distant locations and this raw material is transported on return trips to Guthrie, Oklahoma to be used in the manufacturing process. The company makes no charge for freight on its manufactured furniture and the cost of transportation is absorbed in the delivered price.

To accomplish this transportation, the company maintains a fleet of truck-tractors, a part of which are owned by the company and a part of which are leased to the company for periods of one year. The company maintains a fleet of van-type trailers all of which are owned by the company.

All drivers of trucks are bonafide employees of the company whose incidences of employment are governed by the company's plant union contract. The company directs and controls the entire transportation operation through its officers and supervisory employees who specify all details of performance, coordinate the entire operation and maintain control by adequate checks.

The individual plaintiffs are lessors of the leased truck-tractors, above referred to, and are also employees of the company.

III

By order of August 28, 1957 the Interstate Commerce Commission, Division 1, initiated investigation on its own motion into and concerning the motor vehicle operation and practices to determine whether the plaintiffs have been and are engaged in the transpotration of property in interstate or foreign commerce for compensation as a [fol. 4] common or contract carrier by motor vehicle in violation of any of the provisions of Part II of the Interstate Commerce Commission Act or any requirement established pursuant thereto and whether the company in concert with the individual plaintiffs has participated in any of the said violations. A copy of this order is attached hereto as Exhibit A and made a part hereof.

After hearing, a recommended order was made by the hearing officer (undated, date of service March 11, 1958) a copy of which is attached hereto and made a part of Exhibit B. On April 22, 1959 the Interstate Commerce

Commission, Division 1, entered its report and order in this proceedings, ordering that the individual plaintiffs cease and desist and thereafter to refrain and abstain from all operations in interstate or foreign commerce found in the report to be unlawful and directing compliance date of said order to be June 10, 1959. The proceedings as to the plaintiff company were, by said order, discontinued. A photostatic copy of this order and report is attached hereto as Exhibit C and made a part hereof. Thereafter these plaintiffs timely filed their objections and exceptions to said order and Petition for Reconsideration which Petition for Reconsideration was denied by the Interstate Commerce Commission on December 29, 1959, date of service, January 16, 1960. A copy of this order is attached as Exhibit D and made a part thereof. (Named in the original order were Marion W. Daves, no longer employed by the company, William' M. Martin, now deceased, and Robert A. Custard for whom was substituted at the hearing Charles McGee.)

[fol. 5]

IV

The said proceedings, report, and order, constitute an attempt by the Interstate Commerce Commission to regulate private carriage in excess of the authority granted by Congress and is an attempt to do by subterfuge that which is beyond its authority.

The order and decision of the Interstate Commerce Commission is erroneous, illegal, and void, the said Interstate Commerce Commission being without jurisdiction to conduct said proceedings or to enter said order.

Said order should be held unlawful and the court should set aside the entire proceedings, findings and conclusions for the reason that the same are arbitrary, capricious and an abuse of discretion and otherwise not in accordance with law; contrary to the plaintiffs constitutional rights, powers, privileges and immunities; in excess of statutory jurisdiction, authority and limitation; were entered without observance of procedure required by law; unsupported by substantial evidence; unwarranted by the facts; results in unequal protection of the laws to these plaintiffs based upon a distinction which is fictitious; that said report and

order is contrary to the evidence introduced by the Interstate Commerce Commission at the hearing; that said report and order is in conflict in its own terms; that said report and order is ambiguous and uncertain in that it directs the individual plaintiffs to "cease, desist forthwith, and thereafter to refrain and abstain from all operations in interstate or foreign commerce of the character found in the said report to be unlawful" without specifi- [fol. 6] cally defining the alleged unlawful operations and specifying the same in the order; the report upon which the order rests for validity and construction is ambiguous, contradictory and uncertain.

V

Plaintiffs further allege that the order deprives the plaintiffs of valuable rights and they are without remedy except in this court, having exhausted all of their respective administrative remedies. Unless granted relief by this court the plaintiffs and each one of them will suffer irreparable injury and financial detriment. The individual plaintiffs will be deprived of their contractual rights and property and their earnings upon which their livelihood depends will be substantially diminished without possibility of recoupment. The plaintiff company will be deprived of its right to deliver to its customers its manufactured products and the right to transport in its own vehicles its own raw materials, thereby effectually destroying company's principal business enterprise.

WHEREFORE the plaintiffs pray that this court issue its process to the United States of America and to the Interstate Commerce Commission; that in accordance with Title 28, USCA, Section 2284, the court notify the Chief Judge for the United States Court of Appeals, 10th Circuit, of this action and the necessity for a three judge court; that this court issue its temporary retraining order, restraining and enjoining until a date certain the enforcement of said order; that this court issue upon hearing a preliminary injunction staying the enforcement of said order; that upon final hearing this court find said order to be [fol. 7] void and unenforceable and permanently enjoin

the defendants and their agents, servants and employees from enforcement thereof; and such other and further relief to which the plaintiffs may be entitled in equity.

/s/ Walter D. Hanson, and
/s/ William L. Peterson, Jr. of
HANSON & PETERSON
Suite 929
Leonhardt Building
Oklahoma City 2, Oklahoma
Attorneys for Plaintiffs

Duly Sworn to by Walter D. Hanson.
Jurat Omitted in Printing.

[fols. 8-47] • • • •

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

TEMPORARY RESTRAINING ORDER—January 28, 1960

Whereas in the above named case it has been made to appear by the verified complaint filed herein on this 28 day of January 1960, that a Restraining Order preliminary to the hearing upon motion for Preliminary Injunction should issue, without notice because immediate and irreparable injury, loss, or damage, will result to the plaintiffs before notice can be served and a hearing had thereon, in that the individual plaintiffs will be deprived of their contractual rights and property and their earnings upon which their livelihood depends will be substantially diminished without possibility of recoupment and the corporate plaintiff will be deprived of its right to deliver to its customers its manufactured products and to transport its own raw materials.

Notice and a hearing before entertaining a Temporary Restraining Order should not be required because the [fol. 49] order of the Interstate Commerce Commission ordering the plaintiffs to cease and desist, which is attached to the complaint, shows that the same became effective on January 16, 1960 and plaintiffs will suffer immediate, irreparable injury unless enforcement of the order is restrained.

It is ordered that the defendants, United States of America and Interstate Commerce Commission and each of them, their agents, successors, deputies, servants, and employees, and all persons acting by, through, or under them, be and they are hereby restrained until ten days from the date of this order from enforcing or attempting to enforce the cease and desist order issued by the Interstate Commerce Commission against these plaintiffs on April 22, 1959.

This Temporary Restraint is on the condition that a bond be filed by plaintiffs herein in the sum of $1000 conditioned that the plaintiffs pay such costs and damages as might be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained. The clerk of this court shall approve the bond.

/s/ Stephen S. Chandler
District Judge

Issued at 12:10 o'clock P.M.
this 28th day of January, 1960

[fols. 50-52] • • • •

[fol. 53] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

STIPULATION AND ORDER CONTINUING TEMPORARY RESTRAINING ORDER—Feb. 8, 1960

Now, on this 4 day of February, 1960, subject to the approval of the Court,

IT IS STIPULATED AND AGREED between the parties hereto that the temporary restraining order now in effect in this case be continued in effect until this case can be heard on the merits, of until further order of this court.

HANSON & PETERSON
Attorneys for Plaintiffs

By /s/ Walter D. Hanson

PAUL W. CRESS
United States Attorney

By /s/ Leonard L. Ralston
Assistant U. S. Attorney
Attorneys for Defendants
United States of America and
Interstate Commerce Commission

IT IS SO ORDERED

This 8 day of February, 1960.

/s/ Ross Rizley
United States District Judge.

[fols. 54-65] • • • •

[fol. 66] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed March 28, 1960

The United States of America and the Interstate Commerce Commission (hereinafter referred to as the Commission), defendants in the above-entitled action, for answer to the complaint herein filed:

1.

Admit the allegations in paragraphs I and III.

2.

Admit the allegations in paragraph II to the effect that the company's primary business is the manufacture of furniture at Guthrie, Oklahoma, that furniture is transported from Guthrie to points throughout the United States, that raw materials are transported on return trips to Guthrie, that the company owns certain truck-tractors and leases others, that the company owns a number of van-type trailers, and that the individual plaintiffs are the lessors of the leased truck-tractors. Aver that the company sells it furniture at a delivered price which varies according to the location of the buyer. Deny the other allegations in said paragraph.

[fol. 67]

3.

Deny the allegations in paragraphs IV and V.

4.

Further answering the said complaint, the defendants allege that the Commission in making its report and orders dated April 22, 1959, and December 29, 1959, considered

and weighed carefully, in the light of its own knowledge and experience, eact fact, circumstance and condition brought to its attention by or on behalf of the parties to the said proceeding; and that the said report and orders were not made either arbitrarily or unjustly, or in excess of the authority conferred upon the Commission by law, but are valid and lawful in all respects; and the defendants deny each of and all the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the United States and the Commission deny each and every allegation contained in the complaint.

WHEREFORE, the United States and the Commission pray that the complaint be dismissed.

Respectfully submitted,

/s/ JOHN J. VOORTMAN
Attorney
Department of Justice
Washington 25, D. C.

ROBERT A. BICKS
Acting Assistant
Attorney General

PAUL W. CRESS
United States Attorney
Oklahoma City, Oklahoma

Attorneys for the United States of America

/s/ CARROLL T. PRINCE, JR.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

ROBERT W. GINNANE
General Counsel

Attorneys for the Interstate Commerce Commission

[fol. 68] CERTIFICATE OF SERVICE
Omitted in Printing

[fol. 69] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

PROPOSED ANSWER OF INTERVENING DEFENDANT TO PLAINTIFFS' COMPLAINT—Filed April 1, 1960

Now comes the Regular Common Carrier Conference of the American Trucking Associations, Inc., Intervening Defendant by petition concurrently filed in this cause, and answers the Plaintiffs' Complaint as follows:

I.

Intervening Defendant hereby adopts and incorporates by reference the "Joint Answer to Complaint" filed herein by Defendants United States of America and Interstate Commerce Commission on or about March 28, 1960, as the Answer of Intervening Defendant.

Wherefore, Intervening Defendant prays that the relief sought in the Complaint be denied, and that the complaint be dismissed.

Respectfully submitted,

REGULAR COMMON CARRIER CONFERENCE
of the
American Trucking Associations, Inc.

By Its Attorneys:

Roland Rice
618 Perpetual Building
Washington 4, D. C.

William T. Brunson
508 Leonhardt Building
Oklahoma City, Oklahoma

March 28, 1960

[fol. 70] CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 71] • • • •

[fol. 72] IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

PROPOSED PETITION OF INTERVENING PLAINTIFF, WEATHER-SEAL, INC.—Filed April 19, 1960

Now comes Weather-Seal, Inc., intervening plaintiff by motion concurrently filed in this cause, and hereby adopts and incorporates by reference the petition filed herein by plaintiffs Henry E. Drum, et al, as the petition of this intervening plaintiff.

WHEREFORE, this intervening plaintiff prays that the relief sought in the petition filed by Henry E. Drum, et al, be granted.

Respectfully submitted,

WEATHER-SEAL, INC.

By /s/ Charles R. Iden
Its Attorney
Charles R. Iden
2200 First National Tower
Akron 8, Ohio

[fol. 73] CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 74] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, et al., PLAINTIFFS

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before MURRAH, Chief Judge, CHANDLER, Chief Judge, and RIZLEY, District Judge.

CHANDLER, Chief Judge.

OPINION—August 13, 1960

Plaintiffs instituted this action under 28 U.S.C. Sections 1336, 1398 and Sections 2321 through 2325 to vacate, set aside and annul certain orders of the Interstate Commerce Commission entered in a proceeding initiated by the Commission on its own motion under Section 204(c) of the Interstate Commerce Act (49 U.S.C. Section 304(c)), and to enjoin the Commission from enforcing or attempting to enforce said orders.

[fol. 75] The Commission by order of August 28, 1957, began an investigation under said Section 204(c) of the Act to determine whether the individual plaintiffs, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn and William M. Martin,[1] were engaged in transportation of property in interstate or foreign commerce for compensation as common or contract carriers by motor vehicle, in violation of Part II of the Interstate Commerce Act, and whether the plaintiff Oklahoma Furniture Manufacturing Co. had

[1] Marion W. Daves is no longer employed by Oklahoma Furniture Manufacturing Co. and William M. Martin is now deceased.

participated in any such violation. In its report the Commission found that the individual plaintiffs had been and were engaged in transportation of property in interstate commerce for compensation as contract carriers by motor vehicle without appropriate authority in violation of Section 209(a)(1) of the Interstate Commerce Act (49 U.S.C. Section 309(a)(1)) and entered an order requiring said plaintiffs to cease and desist from all operations found in the report to be unlawful. A petition for reconsideration and exception to said report and order were filed by plaintiffs and denied by the Commission by order of December 29, 1959.

The Regular Common Carrier Conference of American Trucking Associations, Inc. has intervened in this action in support of defendants' position and Weather-Seal, Inc. has intervened in support of plaintiffs' position.

[fol. 76] Oklahoma Furniture Manufacturing Co. (hereinafter referred to as the Company) is engaged in the manufacture of furniture at Guthrie, Oklahoma, which it sells to retail furniture dealers throughout the United States. The Company owns six tractors and seventeen trailers, and in addition to this equipment leases a tractor from each of the individual plaintiffs (hereinafter referred to as owner-operators) under separate lease agreements. All this equipment is used in the interstate transportation of the Company's furniture to retail dealers and in the back-haul of raw materials to the Company. Prior to 1952 the Company carried on all its transportation of goods in company-owned equipment operated by employees of the Company, but upon discovering that the drivers were defrauding it by improper use of credit cards, the Company changed to a system of operation whereby each driver owned and maintained his own tractor, which was leased to the company with the driver being paid on a mileage basis. To effectuate this method of operation, the Company entered into a lease agreement with each driver. These initial leases were subsequently replaced by others which were, in turn, replaced by the present leases with which we are here concerned.

The leases provide in substance as follows: (1) the Company shall pay the owner-operator 10¢ a mile for hauling

single-axle trailers and 11¢ a mile for hauling tandem-axle trailers, plus an additional 3¢ a mile for back-haul of the Company's raw materials, (2) payments under the agreement shall be made weekly, (3) motor vehicles covered [fol. 77] by the agreement shall be operated by an employee of the Company who shall be properly qualified and physically fit in accordance with state and federal regulations, (4) the owner-operator shall pay all operating costs arising from operation of said equipment (gasoline, oil, grease and parts) and shall pay cost of license plates, (5) the Company shall keep and maintain said equipment in first-class operating condition and in compliance with all safety rules and regulations of state and federal regulatory bodies, (6) if owner-operator fails to pay operating cost of equipment, the Company may cancel the agreement or at its option pay the necessary operating costs and charge same to owner-operator's account with the Company, (7) the Company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the Company and the Company will not sublease the equipment to any other person, firm or corporation, (8) the Company shall not be liable for wear, tear and depreciation nor for any damage caused to the leased equipment by accident, theft, fire or any other hazard or casualty, (9) the owner-operator shall not be responsible for loss to company equipment, property and cargo, (10) the Company will have the name of the owner-operator endorsed as an additional assured upon its policies of property damage and public liability insurance covering the operation of motor vehicles, (11) either party may cancel the lease upon giving 30 days' written notice to the other party, (12) the agreement shall remain in full force and effect for one year from date of execution and shall be automatically renewed for further periods of one year [fol. 78] unless cancelled in accordance with provisions of the agreement, or terminated by operation of law.

The Company also entered into a union contract as employer of its drivers. The contract covers both drivers of company-owned vehicles and the owner-operators who usually drive their own tractors and who are also treated

by the Company as employees. Although all the drivers do not belong to the union, the terms of the contract apply equally to non-union employees. This contract provides, in pertinent part, as follows: (1) the Company may discharge any employee for cause, (2) the owner-operators shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cents a mile for living expenses, and 0.25 cents a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, and shall be paid 6 cents a mile for back-hauls of raw materials, (3) drivers of company-owned tractors shall receive a basic salary of $50.00 a week plus 2 cents a mile for driving, (4) owner-operators having driven 75,000 miles during a year in which the contract is in effect shall be entitled to vacation pay computed upon the rate of pay for driving and the average weekly mileage in the preceding year, (5) owner-operators shall maintain their trucks in good running condition at all times, (6) owner-operators shall pay their own living expenses while on the road, (7) the provision of the union contract which guarantees employees 6 hours work or pay if they report for work at their usual or regular time shall not apply to owner-operators.

[fol. 79] The record made before the Commission shows that the operations of the Company and the owner-operators are in substance carried on in accordance with the provisions of the lease agreements and the union contract, with one exception. The lease agreements provide that the Company shall maintain the tractors of the owner operators and the union contract provides that the owner-operators shall maintain them. The testimony in the record supports the Commission's finding that the owner-operators in fact maintain their vehicles.

The record also reveals the following: The owner-operators are not authorized by the Interstate Commerce Commission to engage in the transportation of property either as contract carriers or common carriers by motor vehicle in interstate commerce. The Company uses the 6 tractors which it owns chiefly for short hauls and these are usually driven by the salaried company drivers. The tractors leased by the Company are utilized chiefly for long hauls and are usually operated by the owner-operators, each driving his own tractor. It is the practice of the Company

to assign the same driver to the same equipment, regardless of whether it is company-owned or leased. However, when necessity or convenience make it more feasible to do so, drivers who usually drive company-owned tractors are assigned to leased tractors and owner-operators to company-owned tractors. All trailers used in the Company's operations are owned by it. A supervisor employed by the Company oversees all drivers, assigns trips and checks to see that all equipment is properly maintained and repaired. Detailed routing instructions are issued to all [fol. 80] drivers and compliance therewith is insured by manner of loading, e.g., last goods to come off are loaded first and the first to come off are loaded last. Prior to departure drivers are handed a truck bill manifest which differs from a bill of lading in that the drivers are not required to sign a receipt for the freight they transport. Each owner-operator receives two weekly paychecks, one for rental of his tractor and the other for his service as a driver. The Company deducts from the paychecks of the owner-operators social security and withholding taxes, pays the employer's share of social security and provides workmen's compensation benefits for them. The Company maintains on file drivers' logs, physicians' certificates and vehicle inspection reports. Both company-owned tractors and leased tractors are garaged at the homes of their respective drivers. The Company has the right to hire and fire drivers independently of the lease agreement.

The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in Lamb v. Interstate Commerce Commission, 10 Cir., 259 F.2d 358, put it, "Simply stated it is who was transporting the goods in question," that is, whose operations in interstate transportation were these, those of the Company or those of the owner operators?

The pertinent statutes involved are as follows: 49 U.S.C. [fol. 81] Section 303(a)(15) provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or

foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

49 U.S.C. Section 303(a)(16) provides:

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

49 U.S.C. Section 303(a)(17) provides:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

49 U.S.C. Section 304(c) provides:

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state

reasonable grounds for investigation and action on its part, it may dismiss such complaint."

49 U.S.C. Section 309(a)(1) provides in part:

"Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public [fol. 82] highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business . . ."

49 U.S.C. Section 42 provides:

"In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

The parties appear to be in some slight disagreement as to the scope of judicial review of an order of the Commission. The defendants contend that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282. They further contend that the court can only determine whether or not the Commission's findings are supported by substantial evidence. Riss & Co., Inc. v. United States, W.D. Mo., 100 F. Supp. 468, affirmed 342 U.S. 937, rehearing denied 343 U.S. 937. Plaintiffs, on the other hand, state that a reviewing court when

passing on the validity of a Commission order should ascertain whether it is supported by *substantial evidence on the record considered as a whole.* Coyle Lines v. United States, E.D. La., 115 F. Supp. 272. While this court recognizes the distinction emphasized in the latter case, it nevertheless feels that even under the rule as set forth by defendants a reviewing court will consider the [fol. 83] whole record in determining whether there is substantial evidence to support such an order.

Plaintiffs allege that the Commission was without jurisdiction to initiate its investigation into the operations of plaintiffs for the reason that it proceeded under 49 U.S.C. Section 304(c) which only authorizes it to investigate motor carriers and brokers and that since the term "motor carrier" includes only common carriers and contract carriers, the Commission had no authority to investigate the operations of the Company because it is a shipper and a private carrier. In view of the fact that 49 U.S.C. Section 303(c), 49 U.S.C. Section 306(a)(1) and 49 U.S.C. Section 309(a)(1) prohibit any person from engaging in operations as a common carrier or contract carrier without an appropriate certificate or permit issued by the Commission and that 49 U.S.C. Section 304(c) authorizes the Commission to investigate whether any motor carrier has failed to comply with any provision of Part II of the Act, and after notice and hearing, to issue any appropriate order to compel compliance, it necessarily follows that the Commission has the right, power and duty to inquire into operations such as those involved here to ascertain whether persons are in fact carrying on common carrier or contract carrier operations in violation of the Act. It is therefore evident that the Commission had jurisdiction as regards the owner-operator plaintiffs and 49 U.S.C. Section 42 granted the Commission authority to join the Company.

In reaching its decision on the primary issue herein [fol. 84] involved, the Commission utilized two tests: (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of

property on the public highways for hire. Both tests have been approved by the courts. See Interstate Commerce Commission v. F & F Truck Leasing Co., D. Minn., 78 F.Supp. 13, where the court stated:

> "In order for the operations to be those of the shipper as a private carrier there must be a clear and unequivocal showing that the shipper exercises control and responsibility over the operations of the vehicle, such as would be exercised by it if it were the owner of the vehicle."

See also Interstate Commerce Commission v. Gannoe, W.D. Pa., 100 F. Supp. 790; Motor Haulage Co. v. United States, E.D. N.Y., 70 F.Supp. 17, affirmed 331 U.S. 784; United States v. LaTuff Transfer Service, D. Minn., 95 F.Supp. 375. In regard to the second test mentioned, see Georgia Truck System Inc. v. Interstate Commerce Commission, 5 Cir., 123 F.2d 210; Lamb v. Interstate Commerce Commission, supra; A. W. Stickle Co. v. Interstate Commerce Commission, 10 Cir., 128 F.2d 155, cert. den. 317 U.S. 650.

In addition to these tests the Commission also relied upon a rebuttable presumption (which defendants state is essentially an inference) set forth by the Commission in H. B. Church Truck Service Co., Common Carrier Application, 27 M.C.C. 191, as follows:

> ". . . in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation."

[fol. 85] This "presumption" has been indirectly recognized by the courts. See Motor Haulage Co. v. United States, supra, and Interstate Commerce Commission v. Gannoe, supra. It will be noted, however, that in the above cited Church decision the Commission stated that the presumption arises only "in the absence of a showing to the contrary," and that "This presumption will, of

course, yield to a showing that the shipper has the exclusive right and privilege of controlling the transportation service, . . ." The Commission in that decision further stated:

> "The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No element of such facts and circumstances is by itself controlling."

The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the Church case by the following declaration:

> "There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists."

This is true unless, of course, the Commission formulated a new rule, thinking as this court is inclined to think, that this situation does not technically justify application of the presumption because it is not one involving "a lease of equipment with drivers by a carrier to a shipper," but a lease of equipment alone with the drivers to be supplied by the Company. In any event, the court does not agree with the reasoning of the Commission that the quoted conclusion necessarily follows.

[fol. 86] The record before the Commission discloses that there was more than sufficient evidence to rebut any presumption or inference of transportation for-hire. The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith. The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves.

As is urged by defendants, substance, not form, should be the governing factor in determining whether these

operations constituted transportation for-hire on the part of the owner-operators. United States v. La Tuff Transfer Service, supra; George Truck System, Inc. v. Interstate Commerce Commission, supra. In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators. The Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. The change in form alone did not change the substance of the Company's operations. The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles.

Defendants contend that there are three aspects of this transportation which the owner-operators retained a right [fol. 87] to control. First, it is alleged that since the owner-operators are responsible for the maintenance of their own vehicles, they have the right to decide where and what kind of repairs are to be made. The testimony before the Commission shows that Company personnel oversee maintenance and repairs of all equipment used by the Company; that the owner-operators have to meet the requirements of the Company as to state of repair and that their equipment is checked by Company personnel periodically to ascertain whether it meets certain requirements and whether specified repairs have been made. There is, therefore, no real control over maintenance exercised by the owner-operators. Second, defendants point out that the owner-operators garage their tractors at their homes and that they could use them for their own purposes and could even haul for others. Since drivers of company-owned vehicles also garage the vehicles they drive at their homes, no element of control appears by virtue of the fact that the owner-operators have that right. And, it appearing that the owner-operators are on call at all times to haul Company goods, it is far-fetched to speculate that they might possibly breach their lease

agreements in order to haul for someone else. There is no evidence of any of them ever having done so. Third, defendants contend that the owner-operators retain considerable right to control their vehicles while driving them for the Company and that there is a possibility of a conflict of interest, say in a situation where an owner-operator might have to choose between stopping immediately to make repairs, thereby arriving late with a shipment, or [fol. 88] continuing at the risk of incurring more expensive repairs. All drivers have some independent decisions to make, and as to *possible* areas of conflict, these are *conjectural only* and not of such stature as to constitute an element of control on the part of the owner-operators.

As was pointed out in the dissent to the Commission report, and the statement is equally applicable here, the cases most heavily relied on by the Commission to support its order involve a person or firm owning equipment, employing drivers and making both available to the lessee, or in some cases, to several lessees. The facts here are materially different. In addition, in each of the cases relied on by defendants, there was some element of control long considered important by the courts and the Commission which was retained by the lessor; or there were some duties which ordinarily fall on the carrier, private or otherwise, which were assumed by the lessor or no one.

Upon consideration of the record, the court concludes that the findings of the Commission are not supported by substantial evidence. For that reason the cease and desist order entered against the owner-operators must be set aside. Judgment will be entered accordingly.

[fol. 89] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM. et al., PLAINTIFFS

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER VACATING, SETTING ASIDE AND ANNULLING ORDER OF THE INTERSTATE COMMERCE COMMISSION—Aug. 13, 1960

Now on this 13th day of August, 1960, in accordance with the opinion of the court filed herein this date, the orders of the Interstate Commerce Commission entered in these proceedings are hereby vacated, set aside and annulled.

/s/ Stephen S. Chandler
Chief Judge

[fol. 90] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—
Filed Oct. 12, 1960

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on August 15, 1960.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Complaint, including Exhibits A, B, C, and D attached thereto, filed January 28, 1960.

(2) Temporary Restraining Order, filed January 28, 1960.

[fol. 91] (3) Stipulation, filed February 8, 1960, continuing the temporary restraining order in effect until decision on the merits or until further order of the Court.

(4) Joint answer of the United States and the Interstate Commerce Commission, filed March 28, 1960.

(5) Petition of the Regular Common Carrier Conference of the American Trucking Association for leave to intervene, dated March 28, 1960.

(6) Answer of the Regular Common Carrier Conference of the American Trucking Association, dated March 28, 1960.

(7) Motion of Weather-Seal, Inc. for leave to intervene, date unknown but received by the United States and the Interstate Commerce Commission on April 22, 1960.

(8) Pleading of Weather-Seal, Inc. adopting the complaint in this case, date unknown but received by the United States and the Interstate Commerce Commission on April 22, 1960.

(9) Opinion and Order of the Court, filed August 15, 1960.

(10) All other orders, if any, entered by the Court in this case, including any orders allowing the Regular Common Carrier Conference of the American Trucking Association and Weather-Seal, Inc. to intervene.

(11) The Clerk's docket and minute entries in this cause. [fol. 92] (12) The following documents admitted in evidence by the Court which are certified copies of the record made before the Interstate Commerce Commission in its Docket No. MC-C-2143:

(a) Order of the Interstate Commerce Commission entered August 28, 1957;

(b) Transcript of hearing held November 19, 1957, at Tulsa, Oklahoma, and Exhibits 1 through 5, inclusive, filed at said hearing;

(c) Report and order recommended by the Hearing Examiner served March 11, 1958;

(d) Exceptions of Respondents to said report and order of Hearing Examiner filed April 7, 1958;

(e) Reply of Bureau of Inquiry and Compliance filed April 21, 1958;

(f) Report and order of the Interstate Commerce Commission entered April 22, 1959;

(g) Petition for Reconsideration of Respondents filed May 29, 1959;

(h) Reply of Bureau of Inquiry and Compliance filed July 17, 1959;

(i) Order of the Intesrtate Commerce Commission entered December 29, 1959.

(13) This Notice of Appeal.

[fol. 93] III.

The following question is presented by this appeal:

Whether the District Court erred in setting aside an order of the Interstate Commerce Commission requiring certain owner-operators (plaintiffs herein) to cease and desist from engaging without proper authority in the interstate transportation of property for compensation, where the owner-operators performed the transportation for a shipper under an arrangement the terms of which are set forth in a union contract entered into by the shipper as the ostensible employer of the owner-operators and an instrument denominated a lease, whereby the owner-operators furnish, maintain, drive, and bear the costs of operating power equipment owned by them in return for a fixed and definite compensation per mile of transportation performed for the shipper, receive no salary as driver-employees and no compensation for the lease of their equipment unless they or their equipment are actually engaged in such transportation, and, consequently, bear the risk of profit or loss from such transportation.

/s/ B. Franklin Taylor, Jr.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Robert W. Ginnane
General Counsel
Attorneys for the Interstate Commerce Commission

[fols. 94-95] Proof of Service
(Omitted in Printing)

[fol. 96] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, et al., PLAINTIFFS
and
WEATHER-SEAL, INC., INTERVENING PLAINTIFFS

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS
and
THE REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., INTERVENING DEFENDANT

NOTICE OF APPEAL BY REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., TO THE SUPREME COURT OF THE UNITED STATES—Filed Oct. 12, 1960

I. Notice is hereby given that the Regular Common Carrier Conference of American Trucking Associations, Inc., intervening defendant in the above-entitled matter, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 13, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II. Intervening defendant adopts the request concurrently made by defendants United States of America and Interstate Commerce Commission for preparation and transmission to the Clerk of the Supreme Court of the United States of the transcript of record in this cause, embracing within the adoption each item designated by the said defendants to be included, and, as well, this notice of appeal.

III. The following question is presented by this appeal:

Where the amount of transportation service rendered by owner-operators is the sole measure of their compensa-
[fol. 97] tion, where they operate on call and have no guarantee of mileage to produce income, retain possession of their vehicles and bear the entire risk of profit or loss from the venture, was the District Court wrong in holding the transportation not subject to regulation?

/s/ John S. Fessenden
JOHN S. FESSENDEN

/s/ Roland Rice
ROLAND RICE
618 Perpetual Building
Washington 4, D. C.

/s/ William T. Brunson
WILLIAM T. BRUNSON
508 Leonhardt Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 98] • • • •

[fol. 99] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, et al., PLAINTIFFS

v.

UNITED STATES and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL BY UNITED STATES TO THE SUPREME COURT OF THE UNITED STATES—Filed Oct. 12, 1960

I.

Notice is hereby given that the United States of America, defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on August 15, 1960.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Complaint, including Exhibits A, B, C, and D attached thereto, filed January 28, 1960.

(2) Temporary Restraining Order, filed January 28, 1960.

(3) Stipulation, filed February 8, 1960, continuing the temporary restraining order in effect until decision on the merits or until further order of the Court.

(4) Joint answer of the United States and the Interstate Commerce Commission, filed March 28, 1960.

(5) Petition of the Regular Common Carrier Conference of the American Trucking Association for leave to intervene, dated March 28, 1960.

(6) Answer of the Regular Common Carrier Conference of the American Trucking Association, dated March 28, 1960.

[fol. 100] (7) Motion of Weather-Seal, Inc. for leave to intervene, date unknown but received by the United States and the Interstate Commerce Commission on April 22, 1960.

(8) Pleading of Weather-Seal, Inc. adopting the complaint in this case, date unknown but received by the United States and the Interstate Commerce Commission on April 22, 1960.

(9) Opinion and Order of the Court, filed August 15, 1960.

(10) All other orders, if any, entered by the Court in this case, including any orders allowing the Regular Common Carrier Conference of the American Trucking Association and Weather-Seal, Inc. to intervene.

(11) The Clerk's docket and minute entries in this cause.

(12) The following documents admitted in evidence by the Court which are certified copies of the record made before the Interstate Commerce Commission in its Docket No. MC-C-2143:

(a) Order of the Interstate Commerce Commission entered August 28, 1957;

(b) Transcript of hearing held November 19, 1957, at Tulsa, Oklahoma, and Exhibits 1 through 5, inclusive, filed at said hearing;

(c) Report and order recommended by the Hearing Examiner served March 11, 1958;

(d) Exceptions of Respondents to said report and order of Hearing Examiner filed April 7, 1958;

(e) Reply of Bureau of Inquiry and Compliance filed April 21, 1958;

(f) Report and order of the Interstate Commerce Commission entered April 22, 1959;

(g) Petition for reconsideration of Respondents filed May 29, 1959;

(h) Reply of Bureau of Inquiry and Compliance filed July 17, 1959;

(i) Order of the Interstate Commerce Commission entered December 29, 1959.

[fol. 101] (13) This Notice of Appeal.

III.

In this case the U.S. District Court for the Western District of Oklahoma set aside an order of the Interstate Commerce Commission requiring plaintiffs to cease and desist from operating their trucks in interstate commerce without appropriate Commission authority on the ground that the operations were those of the lessor, Oklahoma Furniture Co., because it exercised exclusive control over vehicle and driver. The question presented by this appeal is whether these operations must nevertheless be considered those of the lessee for purposes of establishing for it the status of a private carrier when the lessee has insulated itself from all the risks of, and has no economic interest in, the operations which it seeks to have regarded as its own.

/s/ Richard A. Solomon
/s/ John J. Voortman

[fol. 102] Certificate of Service
(Omitted in Printing)

[fol. 103] Clerk's Certificate to foregoing transcript
Omitted in Printing

[fols. 104-132] • • • •

[fol. 134]

PLAINTIFF'S EXHIBIT "A"

SECRETARY'S CERTIFICATE

INTERSTATE COMMERCE COMMISSION
Washington 25, D. C.

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Order of the Commission, entered August 28, 1957,

Transcript of the stenographer's notes of hearing held November 19, 1957, at Tulsa, Oklahoma, and exhibits 1 to 5, both inclusive, filed at said hearing,

Report and order recommended by Mack Myers, Hearing Examiner, served March 11, 1958,

Exceptions of Respondents, filed April 7, 1958,

Reply of Bureau of Inquiry and Compliance, filed April 21, 1958,

Report and order of the Commission, filed and entered April 22, 1959,

Petition of Respondents, filed May 29, 1959,

Reply of Bureau of Inquiry and Compliance, filed July 17, 1959, and

Order of the Commission, entered December 29, 1959, in Docket No. MC-C-2143, Oklahoma Furniture Manufacturing Co., et al.—Investigation of Operations,, the originals of which are now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 19th day of May, A. D. 1960.

[SEAL]

/s/ Harold D. McCoy
Secretary of the Interstate
Commerce Commission.

[fol. 135]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C. on the 28th day of August, A. D. 1957

No. MC-C-2143

OKLAHOMA FURNITURE MANUFACTURING COMPANY, ET AL— INVESTIGATION OF OPERATIONS

It appearing, That there is reason to believe that Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, and Robert A. Custard of Guthrie, Oklahoma, Todd Shinn of Edmond, Oklahoma, and William M. Martin of Kingfisher, Oklahoma, have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as common or contract carriers by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act, between Guthrie, Oklahoma, and points and places throughout the United States;

It further appearing, That there is reason to believe that the Oklahoma Furniture Manufacturing Company at Guthrie, Oklahoma, in concert with the parties described in the first appearing paragraph of this order has been, and is now, participating in the aforementioned violations of Part II of the Interstate Commerce Act, as aforesaid;

And it further appearing, That there is not in force a certificate of public convenience and necessity or a permit issued by this Commission authorizing any of the aforementioned parties to engage in operations as a common or contract carrier; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby, instituted under Section 204(c) of the Act into and concerning the motor carrier operations and practices of the said Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Robert A. Custard, Todd Shinn, and William M. Martin with a view to determining whether they have been and are engaging in the transportation of property in interstate or foreign commerce for com-

pensation as a common or contract carrier by motor vehicle, in violation of any of the provisions of Part II of the Interstate Commerce Act, or any requirements established pursuant thereto, and whether the said Oklahoma Furniture Manufacturing Company, in concert with the aforementioned parties, has participated in said violations; to determining what orders should be entered to remove any unlawfulness found to exist, and for the purpose of taking [fol. 136] such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That Marion W. Daves, 1410 Fogarty, Guthrie, Oklahoma, Henry E. Drum, Route 4, Ruthrie, Oklahoma, N. C. Newman, 205 N. First Street, Guthrie, Oklahoma, A. D. Woodard, 618 East Springer, Guthrie, Oklahoma, George F. Daves, 600 Hill Drive, Guthrie, Oklahoma, Oscar Daves, Route 2, Guthrie, Oklahoma, Archie Norris, 312 N. 11th Street, Guthrie, Oklahoma, Eugene Wiggins, Route 5, Guthrie, Oklahoma, Robert A. Custard, 214 East Vilas, Guthrie, Oklahoma, Todd Shinn, 515 S. Littler Street, Edmond, Oklahoma, William M. Martin, Kingfisher, Oklahoma, and Oklahoma Furniture Manufacturing Company, 308 College Avenue, Guthrie, Oklahoma, be, and they are hereby, made respondents in this proceeding, and that this matter be set for hearing at a time and place to be fixed;

It is further ordered, That the Bureau of Inquiry and Compliance shall timely inform the respondents of the matters of fact and law to be asserted at the hearing;

And it is further ordered, That a copy of this order be served upon said respondents, and that notice of this proceeding be given to the public by posting a copy of this order in the office of the secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 137] BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2143

In the Matter of:

OKLAHOMA FURNITURE MANUFACTURING COMPANY, ET AL—
INVESTIGATION OF OPERATIONS

Room 252,
U. S. Post Office Building,
Tulsa, Oklahoma.

TRANSCRIPT OF HEARING OF NOVEMBER 19, 1957

Met, pursuant to notice, at 9:30 a. m.

BEFORE:

MACK MYERS, Examiner.

APPEARANCES:

WALTER D. HANSON, 929 Leonhardt Building, Oklahoma City, Oklahoma, appearing for the respondents.

LLOYD R. REEDER and WILLIAM W. GUILD, Room 816, T. & P. Building, Fort Worth, Texas, appearing for the Bureau of Inquiry and Compliance.

[fol. 138] • • • •

[fol. 139] PROCEEDINGS

COLLOQUY BETWEEN EXAMINER AND COUNSEL

EXAM. MYERS: All right, gentlemen, the hearing will come to order.

The Interstate Commerce Commission has set for hearing at this time and place Docket No. MC-C-2143, the Oklahoma Furniture Manufacturing Company, et al—an investigation of operations.

By order entered August 28, 1957, the Commission, Division One initiated an investigation on its own motion

under authority of Section 204 (c) of the Act into and concerning the motor carrier operations and practices to determine whether the respondents—Oklahoma Furniture Manufacturing Company, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Robert A. Custard, Todd Shinn and William M. Martin—have been and are engaged in transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of any of the provisions of Part II of the Interstate Commerce Act, or any requirement established pursuant thereto, and whether the said Oklahoma Manufacturing Company, in concert with the aforementioned parties, has participated in said violation; to determine what order should be entered to remove any unlawfulness found to exist, and for the purpose of taking such other and further action as the facts and circumstances may appear to warrant.

Now I'll take the appearances for the respondent.

[fol. 140] MR. HANSON: I would like to ask one question. The number which you gave did not correspond to the number which we have.

EXAM. MYERS: It's 2143. That's right.

MR. HANSON: For the record, Mr. Reporter, those names are Daves, D-a-v-e-s, not Davis.

EXAM. MYERS: Yes, that's the way I have them, D-a-v-e-s.

Is that the way you pronounce it?

MR. HANSON: Yes.

EXAM. MYERS: Would you enter your appearance.

MR. HANSON: Walter D. Hanson for the respondents.

EXAM. MYERS: Have you been admitted to practice before the Commission?

MR. HANSON: No, sir.

EXAM. MYERS: And for the Bureau of Inquiry?

MR. REEDER: Lloyd R. Reeder for the Bureau of Inquiry and Compliance, and William W. Guild.

EXAM. MYERS: Any other appearances?

(No response.)

EXAM. MYERS: Are the respondents ready, Mr. Hanson?

MR. HANSON: Yes, sir, we are ready.

We would like at this time to enter a formal objection in the record to the jurisdiction of the Commission to conduct this inquiry since the Oklahoma Furniture Manufacturing Company is a private carrier under the law, as we see it, and the other respondents are our employees, [fol. 141] and therefor we wish to object to the jurisdiction of the Interstate Commerce Commission to conduct this hearing. I want that noted before we proceed.

EXAM. MYERS: I'll overrule the objection. You may proceed.

Off the record.

(Discussion off the record.)

EXAM. MYERS: On the record.

All right, Mr. Reeder, will you proceed.

MR. REEDER: Mr. Examiner, as I understand it, the Bureau of Inquiry and Compliance has the burden of going forward with the proof in this. The respondents and the Bureau of Inquiry and Compliance have agreed upon an agreement and stipulation as to the facts and exhibits to be introduced. I would like to have the Examiner's permission to read the agreement and stipulation at this time.

EXAM. MYERS: All right.

READING OF STIPULATION

MR. REEDER: Before the Interstate Commerce Commission Docket No. MC-C-2143, in the matter of Oklahoma Furniture Manufacturing Company, et al—investigation of operations.

Agreement and stipulation.

It is hereby agreed and stipulated by and between the Bureau of Inquiry and Compliance, Oklahoma Furniture Manufacturing Company, a corporation, hereafter referred to as Oklahoma Furniture, or the company, and Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles McGee, Todd Shinn and Wil- [fol. 142] liam M. Martin, hereafter referred to as indi-

vidual respondents, that the following facts are true and correct and may be introduced into evidence at the hearing in the above-captioned proceedings, subject only to the objection of any party to the materiality of said facts. It is further agreed and stipulated that the documents hereto attached may be introduced into evidence as part of the record of the proceedings without further proof of their authenticity, save and except the parties hereto retain the right to object to the materiality of such documents.

(1) Oklahoma Furniture is a Delaware corporation with its principal place of business, a furniture manufacturing plant, located at Guthrie, Oklahoma. The primary business of the company is the manufacture and sale of low-price furniture sold to retail dealers throughout the United States. All shipments of its products are made from its Guthrie plant. The officials of Oklahoma Furniture are: Lewis B. Morrow, president: R. H. Walker, vice-president; and L. M. Poer, secretary-treasurer.

(2) The individual respondents reside at or near Guthrie, and are all residents of the State of Oklahoma. Each of the individual respondents owns a tractor which is operated under a lease arrangement with Oklahoma Furniture. A representative copy of the vehicle lease arrangement between Oklahoma Furniture and the individual respondents is marked Appendix A and is attached hereto and made a part hereof for all pertinent purposes. [fol. 143] The operation of the tractors of the individual respondents with the trailers of the company is in the interstate transportation of the company's furniture dealers located at different points throughout the United States, generally east of the Rockies, and the back-haul of raw materials used by Oklahoma Furniture in the manufacture of its furniture.

(3) The respondents are not authorized by the Interstate Commerce Commission, individually or collectively, to engage in the transportation of property either as contract carriers or common carriers by motor vehicle in interstate or foreign commerce, and have made no application for such authority.

(4) Oklahoma Furniture owns and operates six tractor units which it employs in the local and short distance interstate transportation of its furniture. It employs six salaried drivers to operate the said company-owned tractors. The company owns all of the trailers employed in the transportation of its furniture and back-haul of its raw materials.

(5) Prior to 1952, Oklahoma Furniture performed the transportation of furniture in company-owned vehicles operated by employees of the company. In 1951, Oklahoma Furniture suspected that it was being defrauded by its drivers. These drivers had been furnished gasoline credit cards for the purpose of charging truck expense on the road. The company hired detectives and conducted an investigation and found that of thirteen drivers, twelve were defrauding the company by padding gasoline tickets. [Fol. 144] For example, a man would actually buy eighty gallons of regular gasoline but would obtain a ticket charging the company with one hundred gallons of ethyl gasoline, getting a difference in cash. The company computed its loss over a three year period at approximately $27,000 and recovered substantially all this amount from various filling stations and from a bonding company. This investigation disclosed, in addition to the padding of gasoline tickets, that gasoline was being placed in the employees' own personal cars, that repairs on employees' own personal cars were being charged to the company, and that cartons of cigarets were being charged to the company as ten gallons of gasoline for each carton. After this investigation Oklahoma Furniture discharged all of its drivers, with the exception of the one that was cleared.

(6) Thereafter, Oklahoma Furniture determined to change its operations to a system whereby the driver would own and maintain his own truck, which would be leased to the company with the driver being paid upon a mileage basis with an adjustment for back-hauls. In carrying out this purpose, a lease was drawn to be signed by each driver.

The principal reason Oklahoma Furniture changed its operations to the lease agreement was to avoid drivers' breaches of trust, and to reduce its cost of operation.

It was the opinion of the company management that there would be no incentive for a driver to pad gasoline tickets [fol. 145] which he himself had to pay. Its records indicated that there were minor repairs that were due to poor maintenance by the driver being made at excessive prices. It was the opinion of the company management that a man operating his own tractor would operate it more carefully and be more careful to properly maintain said tractor when he was responsible not only for the cost of maintenance but for any deterioration of said vehicle due to improper maintenance.

(7) The initial lease agreements, a representative copy of which is attached hereto and marked Appendix B for all pertinent purposes, were canceled by subsequent lease agreements, representative copies of which are marked Appendix C and attached hereto for all pertinent purposes.

(8) On or about July 1957 the lease agreements described in Paragraph (7) above were canceled and the present lease arrangements referred to in Paragraph (2) above were entered into between Oklahoma Furniture and the individual respondents.

Further, Oklahoma Furniture negotiated with the United Furniture Workers of America, AFL-CIO, Local Union No. 272, to include individual respondents in a union contract covering rates of pay, working conditions, and fringe benefits. A copy of the union contract of December 14, 1956, together with the amendment of July 15, 1957, are marked Appendix D and attached hereto for all pertinent purposes. Since the execution of the union contract the company has paid Social Security upon the wages of the individual respondents, and has [fol. 146] provided Workmen's Compensation benefits as required by the laws of the State of Oklahoma, and have withheld from the individual respondents' earnings withholding tax as provided by law.

(9) Subsequent to the institution of the captioned investigation proceedings by the Interstate Commerce Commission, Robert Custard, one of the vehicle owners, terminated his vehicle lease contract with Oklahoma Furniture, and said company entered into another lease ar-

rangement with Charles McGee, of Route 4, Guthrie, Oklahoma. It is agreed and stipulated between the parties hereto that said Charles McGee shall be substituted in the place of Robert Custard, and made a party to this investigation proceeding.

(10) It is stipulated and agreed that by entering into this stipulation the respondents do not admit the jurisdiction of the Interstate Commerce Commission or of the Examiner to conduct this hearing.

(11) It is stipulated that any party to this proceeding may introduce any additional evidence upon the hearing of this cause.

Signed Oklahoma Furniture Manufacturing Company and the eleven respondents, individual respondents, by their attorney, Walter D. Hanson, and by Lloyd R. Reeder, attorney for the Bureau of Inquiry and Compliance.

At this time I would like to have this exhibit marked and entered.

EXAM. MYERS: All right, it will be marked Exhibit [fol. 147] No. 1 and received in evidence.

(Bureau's Exhibit No. 1, Counsel Reeder, was marked for identification and was received in evidence.)

MR. REEDER: Now, Mr. Examiner, I would like to have Appendices A, B, C and D marked and entered into evidence as part of the record.

EXAM. MYERS: They will be marked consecutively.

MR. HANSON: Mr. Reeder, what is Appendix D?

MR. REEDER: Appendix D is your contract agreement with the union, with the appendix thereto of July 15.

(Bureau's Exhibits Nos. 2, 3, 4 and 5, Counsel Reeder, were marked for identification.)

EXAM. MYERS: Do you move the admission of these now, Mr. Reeder?

MR. REEDER: Yes, sir.

EXAM. MYERS: Any objection?

MR. HANSON: No, sir.

EXAM. MYERS: Exhibits 2, 3, 4 and 5 will be received in evidence.

(Bureau's Exhibits Nos. 2, 3, 4 and 5, Counsel Reeder, were received in evidence.)

MR. REEDER: Call Eugene Wiggins.

EUGENE ROBERT WIGGINS

was sworn and testified as follows:

[fol. 148] DIRECT EXAMINATION

Q. (By Mr. Reeder) Will you state your name, please.

A. Eugene Robert Wiggins.

Q. Where do you live, Mr. Wiggins?

A. Guthrie, Oklahoma.

Q. Guthrie?

A. Yes.

Q. Do you live in town in Guthrie?

A. No, sir, I live approximately four miles east of Guthrie on—

MR. GUILD: I am sorry, I can't hear the witness.

THE WITNESS: I say I live four miles east of Guthrie.

Q. (By Mr. Reeder) Do you live on an acreage or a farm?

A. Acreage, yes.

Q. Do you operate the acreage yourself?

A. Well, I live there; yes, I operate it, I'd say.

Q. You own a vehicle which is leased to Oklahoma Furniture Manufacturing Company?

A. Yes, sir.

Q. How long have you leased your vehicle to the Oklahoma Furniture Manufacturing Company?

A. I believe since the 7th of July.

MR. HANSON: Just a minute, please. Are you referring now to the present?

MR. REEDER: I am referring to any—

MR. HANSON: I think we should specify by the time.

[fol. 149] Q. (By Mr. Reeder) When did you first lease to Oklahoma Furniture Manufacturing Company?

A. '56, I believe July 7.

Q. July 7, 1956?

A. Yes, sir.

Q. Since then you have continued to lease your vehicle to Oklahoma Furniture Manufacturing Company from that date to this?

A. Yes, sir.

Q. You have changed your lease in the meantime, your lease agreement between yourself and Oklahoma Furniture, has that been changed between the time you started?

A. Yes, sir.

Q. How many times has that been changed?

A. Once.

Q. Do you transport furniture and raw materials for Oklahoma Furniture Manufacturing Company, do you transport furniture outside the State of Oklahoma in interstate commerce?

A. Yes, sir.

Q. Where do your trips generally take you?

A. Well, various places. It's no certain place, just out of state.

Q. Long trips?

A. Yes, sir.

Q. Then you bring in raw materials on back-haul?

A. That's right.

[fol. 150] Q. At the time of your first lease agreement with the Oklahoma Furniture, what basis were you paid for your truck?

A. I believe it was 18 or 19 cents, I believe. I am not quite certain.

Q. Eighteen cents a mile on outbound trips loaded with furniture, is that right?

A. I believe. I am not—

MR. HANSON: If the Examiner please, I think this is immaterial. It has been stipulated and the agreements are in evidence, which he had and which set up the rate of pay on each condition.

EXAM. MYERS: Is that true, Mr. Reeder?

MR. REEDER: What I am going to try to establish, Mr. Examiner, if there is any difference in the rate of pay of what it has been and what it is now.

EXAM. MYERS: All right, I'll let him answer. Overruled.

Q. (By Mr. Reeder) I asked the question, that was eighteen cents on outbound trips with furniture, manufactured furniture?

A. Yes, sir, I believe that's what it was.

Q. And nineteen cents on back-hauls, is that correct?

A. I believe it is.

Q. What was the reason for the difference between outbound and inbound shipments?

A. Well, on the inbound if you picked up a load you were heavily loaded, more so on furniture, more cost for fuel coming back.

[fol. 151] Q. Now, in all of the lease agreements have you paid the cost, maintenance, gasoline, oil, on your vehicle yourself?

A. I did.

Q. Do you continue to do that, all through the lease agreements that you have worked under?

A. Yes, sir.

Q. What's your rate of pay now under the present lease agreement?

A. Nineteen, twenty.

Q. Nineteen and twenty?

A. Yes, sir.

MR. HANSON: Just a minute, Mr. Reeder, you asked him his rate of pay. Now, we have stipulated here that he has one rate for his truck and then has a pay under the contract with the union. I think he's combining the two there in his statement and I think that might be confusing to the Examiner. If you would ask him by the lease, or we have the lease in evidence, and then by his pay.

MR. REEDER: Mr. Examiner, I am trying to establish whether this, how this driver is paid, how he feels that he's paid under the terms of this lease.

EXAM. MYERS: Yes, let him answer.

Q. (By Mr. Reeder) How did you say you were paid at the present time?

A. I draw two checks from Oklahoma Furniture; one is [fol. 152] for driving, the other is for the lease of the truck.

Q. How much are you paid for driving?

A. Five and six cents a mile.

Q. Five and six?
A. Yes, sir.
Q. What's that dependent upon, the five and six?
A. Five is a mile outbound furniture, I pick up a load, I get six cents a mile driving back.
Q. For driving back?
A. That's right.
Q. Thats' due to the aded weight, or what?
A. Well, it just works you more and you have more weight.
Q. How much are you paid for your truck under the present lease arrangement?
A. Ten cents going out.
Q. Ten cents going out?
A. Yes, sir.
Q. And what coming back?
A. Well, you get three cents a mile additional for full backs.
Q. Ten cents out and thirteen cents back?
A. Yes.
Q. What's the reason for the difference there?
A. You have a load coming back.
Q. Beg pardon?
A. I say, you have a load coming back, a heavier load.
[fol. 153] Q. A heavier load?
A. Yes, sir.
Q. In other words, on trips out you get fifteen cents a mile; that's a total?
A. Fifteen and sixteen, yes.
Q. Fifteen and sixteen. What does that depend upon?
A. What do you mean, what does it depend upon?
Q. Well, I mean whether you get fifteen or sixteen.
A. Well, it's a single-axle trailer with a pull out, out pull furniture—
Q. I am sorry, I can't understand you.
A. You better ask me that question again, then.
Q. I say, what does the—you say on outbound trips you get fifteen or sixteen cents per mile, a total of that. Now, what does that depend on whether it's fifteen or sixteen?
A. Well, I am slightly confused, a while ago I said ten or eleven. Now, this difference is with the pull out and

pull back and also the driving of the vehicle out and back is the difference.

Q. Let me ask you this, Mr. Wiggins, isn't it true if you pull a tandem trailer you get a cent more out?

A. Yes, sir.

Q. And if you pull a single-axle trailer you get a cent less, is that right?

A. That's right, yes, sir.

Q. And then on back hauls if you are loaded you get three cents extra?

[fol. 154] A. That's right.

Q. Is the cost of operating your vehicle more on back-hauls?

A. Yes, sir.

Q. And you still have to pay all the gasoline consumption, which is more on a heavier load?

A. As a rule, yes.

Q. And which is more when you have a tandem trailer rather than a single-axle trailer?

A. Yes, sir.

Q. And you are responsible for all the costs of that operation?

A. Of my tractor, yes.

Q. You belong to the union now, is that correct?

A. Yes, sir.

Q. You pay your own dues to the union?

A. That's right.

Q. By a check-off system with the company, I mean they pay it and take it out of your salary, is that correct?

A. You mean I have a union card?

Q. Yes.

A. Yes, I have.

Q. Do you pay union dues?

A. Yes, sir.

Q. Do you know how much your dues are a year?

A. No, sir.

Q. Do you know how much is taken out each month or [fol. 155] every three months, or when it's taken out of your pay the union dues?

A. No, sir, I don't.

Q. You don't have any idea how much union dues are?
A. No.
Q. Who pays the insurance on your vehicle?
A. Oklahoma Furniture.
Q. Do you carry collision, fire and theft on your vehicle?
A. Liability.
Q. I say, do you carry—you don't carry collision or fire or theft?
A. No, I don't.
Q. And Oklahoma Furniture pays all the liability?
A. Yes, sir.
Q. Who's liable in case your truck burns up or you wreck your vehicle?
MR. HANSON: I object to that as calling for a conclusion on the part of this witness, which would be a matter of interpretation of the agreements.
Q. (By Mr. Reeder) All right, Mr. Wiggins, I'll withdraw that question.
So that the Examiner will know exactly the operation, what happens when you prepare to take a trip away from Guthrie, where is your truck kept when it's not in use, your vehicle?
A. My home.
Q. It's at your home?
[fol. 156] A. Yes, sir.
Q. Thats' four miles east of the city of Guthrie?
A. That's right.
Q. You get a call, what happens, how do you know that you are supposed to go out on a trip?
A. We have a bulletin board.
Q. Beg pardon?
A. We have a bulletin board.
MR. GUILD: I am sorry, Mr. Examiner, I can not hear the witness.
THE WITNESS: I say, we have a bulletin board at Oklahoma Furniture, the shipping department.
Q. (By Mr. Reeder) Do you check on that bulletin board every morning that you are in?
A. Yes, I do.
Q. Now, you drive into the plant to check to see if you are to be loaded out?

A. Not always, call up.

Q. Call up?

A. That's right.

Q. Now, when you get a load out, or you find out that you are to load out, you go to the Oklahoma Furniture Company with your vehicle?

A. Yes, sir.

Q. And you load onto an Oklahoma Furniture trailer?

[fol. 157] A. That's right.

Q. And it might be a tandem or might be a single-axle trailer?

A. Yes, sir.

Q. And you take it to its destination?

A. That's right.

Q. Do you pay all the expenses of that operation to the destination?

A. Yes, sir.

Q. Then you may or may not—let's assume that you do on this trip—pick up raw materials to haul back to Oklahoma Furniture Manufacturing plant and you bring those—who chooses your route, incidentally, or the way you are going, say you are going to Cleveland, Ohio?

A. The company does.

Q. And you go exactly the route that they tell you to go?

A. We are paid the shortest direct route and naturally that's the shortest way that we are to go.

Q. When you get back, then, to Guthrie, Oklahoma, with your trailer, what happens, what do you do then? You come to Oklahoma Furniture Manufacturing plant loaded with raw materials, what do you do then?

A. Unhook the trailer and go home.

Q. Who maintains and repairs your vehicle?

A. They have a man there at the company that does, oversees it.

Q. At the Oklahoma Furniture Manufacturing plant at Guthrie?

[fol. 158] A. Man that takes the equipment up and has it checked, yes.

Q. How often does he do that, Mr. Wiggins?

A. I couldn't tell you. I don't know.

Q. Do you do that every trip?

A. I say I don't know.

Q. Do you turn in vehicle inspection reports on the whole unit of the vehicle, the trailer and the truck?

A. Yes, sir.

Q. Who pays for the repairs if there is something wrong with your vehicle, with your truck?

A. I pay it if it's wrong with my truck.

Q. Beg pardon?

A. I keep my own upkeep on my truck.

Q. Mr. Wiggins, have you ever had an accident when you were on one of these trips for Oklahoma Furniture?

A. I have.

Q. What do you do when you have an accident? What did you do at the time?

A. You mean all that I did or—I notified the company, called the Highway Patrol, ambulance, notified the company.

Q. What kind of an accident was this? Have you had more than one?

A. Yes, I have had more than one accident.

Q. When was the last one, approximately?

A. February 22, 1956.

[fol. 159] Q. What kind of an accident was this?

A. A car run into me.

Q. Did you have damage to your tractor?

MR. HANSON: Mr. Wiggins, you said '56. Don't you mean '57?

THE WITNESS: Yes, '57.

Q. (By Mr. Reeder) Did you have damage to your tractor?

A. Yes, sir.

Q. What did you do with the tractor?

A. It was towed to a garage to be repaired.

Q. And repaired?

A. Yes, sir.

Q. Who picked the garage out?

A. I did.

Q. Who arranged for the repairing of the vehicle?

A. Who arranged for it?

Q. Yes, sir, who gave the man authority to repair the vehicle?

A. I did.

Q. Who paid for the repair of that vehicle?

A. The insurance company.

Q. Then you do carry collision insurance on your vehicle?

A. No, sir, the other person, he—

Q. You did at that time?

MR. HANSON: No, let him answer the question.

THE WITNESS: The fellow that ran into me, he had insurance. His insurance taken care of it.

[fol. 160] Q. (By Mr. Reeder) On the previous occasions where you have had accidents, was there damage to your vehicle?

A. Yes, sir.

Q. What did you do then?

A. I drove it to Sapulpa and there back home and had it repaired at home, Guthrie.

Q. Who repaired it for you there at Guthrie?

A. Ford Garage.

Q. Who authorized them to repair it? Who arranged for the repair on it?

A. Well, more or less the company.

Q. What do you mean, more or less the company, Mr. Wiggins? Who took it to the garage?

A. I took it to the garage.

Q. Mr. Wiggins, you said that the company inspected your vehicle. When do they inspect your vehicle?

A. Well, you mean the tractor?

Q. Yes. That's your vehicle, the one we are talking about.

A. It was inspected just, I believe, last week.

Q. Well, I mean when do they do it ordinarily?

MR. HANSON: Mr. Examiner, I would like to object to the relevancy of this line of inquiry since the only issue as I see it, as made up by Mr. Reeder's letter to me, is what he intended to contend at this hearing was in connection with the operations and that there is no issue in [fol. 161] this hearing as to our safety operations, compliance with safety regulations or anything else, the only question being the nature of the contract which we have.

MR. REEDER: Mr. Examiner, if this is a bona fide lease, Oklahoma Furniture Manufacturing Company has control of this vehicle and that's what I am trying to establish, whether they actually do have control of the vehicle.

MR. HANSON: Then I would like that you separate your questions or direct your questions to the present arrangement and not to the old lease, because you have asked him about two accidents which he had under his prior lease, and please separate it out or direct it to the agreement which is in controversy here. The old ones are out. They are not in existence, none of them, and are not in issue in this hearing.

Q. (By Mr. Reeder) Clarify that, then, Mr. Wiggins, is there any difference in the lease you operated under prior to approximately July of this year and the one you are operating under now as to what you do when you have an accident?

A. How's that again?

Q. Is there any difference—prior to July you operated under one lease, since July you have operated under the lease that you are operating under now, isn't that correct?

A. That's right.

Q. Is there any difference, assuming that you had an accident under the first lease and an accident under the second lease, is there any difference in the action you'd [fol. 162] take prior to July than there is now?

A. Necessarily there isn't.

Q. You'd still be responsible for fixing your own tractor, is that right?

A. That's right.

Q. Now, back to this inspection of your vehicle; when, ordinarily, is your vehicle inspected by Oklahoma Furniture Manufacturing? Do they have a systematic inspection of it?

A. Well, I have repair reports to turn in on the tractor and trailer both. If there's anything wrong with either one I write it up and it's taken care of.

Q. All right. Do you recall ever writing up anything wrong with your tractor, your truck?

A. No, sir.

MR. REEDER: All right. That's all.
MR. HANSON: No questions.
EXAM. MYERS: You are excused.
(Witness excused.)
MR. REEDER: Call Mr. McGee.

CHARLES W. McGEE

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Reeder) Mr. McGee, where do you live?
A. 1311 West Warner, Guthrie.
EXAM. MYERS: Would he give his full name.
[fol. 163] THE WITNESS: Charles W. McGee.
MR. GUILD: Would you speak a little louder, I can't hear you. I have got a cold and my hearing is defective.
Q. (By Mr. Reeder) How long have you been operating under a lease agreement with the Oklahoma Furniture Manufacturing Company, Mr. McGee?
A. Since '52.
Q. Since 1952?
A. Yes, sir. No, that was '53, '53 instead of '52.
Q. Have you stopped in that interim and not, or have you been continuously operating under that?
A. I was with the California Furniture, which is the same, practically the same as Oklahoma, for one year.
Q. Then you came back to Oklahoma?
A. Then I came back to Oklahoma, yes, sir.
Q. And you are operating under—when did you come back to Oklahoma?
A. February, February 2.
Q. Now, is your operation substantially that that Mr. Wiggins testified to? You heard Mr. Wiggins testimony?
A. Yes, sir, all of our agreements, lease agreements, are identical.
Q. Now, do you know how many—do you pay union dues?
A. No, sir.
Q. Do you carry a union card?
[fol. 164] A. No, sir.

Q. You are not a member of the union?

A. No, sir, absolutely not.

Q. Does the company pay Workmen's Compensation on you?

A. Yes, sir.

Q. And they have withholding tax?

A. Yes, sir.

Q. And you are paid on the same mileage basis that Mr. Wiggins testified to?

A. Our mileage basis is, on a single-axle is ten and five out, ten cents a mile for the tractor and five cents a mile for ourselves, and on the back-haul is thirteen cents a mile for our tractor and six cents a mile for ourselves. On the tandem it's one cent higher.

Q. Now, what's the difference between the total amount of pay that you receive now for yourself and your tractor and what you operated under prior to the lease agreement?

A. In actual money, I mean what we get, there's not, but the company pays for insurance, our Workmen's Compensation—

Q. What insurance does the company pay?

A. Liability.

Q. They did that under the prior lease agreement, did they not?

A. No.

Q. You carried your own liability insurance?

A. Yes, sir.

[fol. 165] Q. Now, who pays your collision and comprehensive insurance?

A. We don't have any collision.

Q. You don't have any collision on your tractor at all?

A. No, sir. We pay our fire and theft.

Q. You pay it yourself?

A. Yes, sir. They pay our liability.

Q. Now, where is your vehicle kept when it's not in use?

A. Well, if it's—if there's something wrong with it, it's in the garage.

Q. What garage?

A. O. B. Burst, International Harvester.

Q. By whose authority is it in the garage?
A. Mine.
Q. You put it in?
A. Yes, sir.
Q. Do you arrange for the repairs on it?
A. Yes, sir.
Q. Do you pay for the repairs?
A. Yes, sir.
Q. Have you ever had any accidents, Mr. McGee?
A. Yes, sir, one, one serious accident.
Q. When was that?
A. In '53.
Q. Did it damage your tractor?
A. No, sir.

[fol. 166] Q. When you come back from a trip loaded or unloaded with Oklahoma Furniture's trailer, what do you do when you get to Guthrie?

A. We take the trailer to the yard when we get into town, we take the trailer to the yard and make the repair report on the truck and trailer. We carry the sheets in the truck all the time with us.

Q. How many of those repair reports have you turned in? Do you do it on every trip?

A. Yes, sir.

Q. For the last how many months have you done that?

A. Well, since I came back from California. I don't know how long that was.

Q. In the event you say there's something wrong with your vehicle and you, after you prepare that report and you know that there's something wrong with your truck tractor, what happens then?

A. I turn that report in and put my truck in the garage and it stays there until that's fixed.

Q. In what garage?

A. O. B. Burst, International Harvester.

Q. What happens when you report a trailer defect?

A. That trailer is taken to the garage and fixed.

Q. Do you know what garage?

A. Crutchfield, I think, does the biggest part of that work.

[fol. 167] Q. And that's Oklahoma Furniture?

A. That's Oklahoma Furniture.

Q. Somebody with the company arranges for that repair?

A. Yes, sir.

Q. But has anybody ever checked you to see if you have repaired your defects in your tractor?

A. Yes, sir.

Q. When do they do that?

A. When the truck is brought out from the garage before going out on another trip.

Q. Who does that inspection?

A. Mr. Kennedy.

Q. Mr. Kennedy?

A. Yes.

MR. REEDER: That's all.

CROSS EXAMINATION

Q. (By Mr. Hanson) Now, under the arrangements, lease agreement which you have now and the union contract, the company pays you, they have a vacation plan under the present agreement, do they not?

A. Yes, sir, two weeks.

Q. Did you have that prior to the, prior to July of 1957?

A. No, sir.

Q. Did the company, prior to 1957, pay any Workmen's Compensation on you?

[fol. 168] No, sir.

Q. Did they pay any Social Security on you?

A. No, sir.

Q. Did they withhold anything from your pay for withholding tax, insurance tax?

A. No, sir.

Q. Now, Mr. McGee, were you, at one time did you drive a company truck?

A. Yes, sir.

Q. And in connection with the operation of the company truck was there any difference in the manner in which your truck was routed and the control which the company exercised over the delivery of that furniture than there is under the present arrangement?

A. No, sir, outside of meeting your own personal expenses, you can't, you couldn't tell any difference.

Q. But I mean when you took a load out was your route directed, when you took a load with the company truck was your route directed by the company where you were going?

A. We were supposed to take the most direct route and not get on state roads any more than we have to, I mean county roads, rather, our direct route.

Q. When I am getting at, the operation was the same with you driving the company truck as it is now when you are driving your truck under lease?

[fol. 169] A. Yes, sir, identical.

Q. Identically the same. Now, you have not at any time, while you have been with Oklahoma Furniture, either as a company driver or as a driver with a company truck or under the prior arrangement, or under the present arrangement, you have not hauled for anyone else?

A. No, sir.

Q. You haven't had any employment by anyone else?

A. No, sir.

MR. HANSON: That's all.

REDIRECT EXAMINATION

Q. (By Mr. Reeder) One other question, or a couple of more questions, please. You say that you are, assuming that you were sick for a month, would you get any pay?

A. Yes, sir, the company would take my tractor and put another driver on it.

Q. Has the company ever taken your tractor and put another driver on it?

A. No, sir, they haven't, but they—

Q. Have you ever driven any other tractor—

A. Yes, sir.

Q. I mean other than a company-owned vehicle?

A. Yes, sir.

Q. When did you do that?

A. At any time we—

[fol. 170] Q. I know, but when did you ever?

A. Last week.

Q. Whose was it?
A. Gene Drum's.
Q. But you had never prior to last week?
A. Oh, yes, sir, yes, sir, all the time. We change trucks a lot.
Q. Did you ever take the company truck home with you?
A. While I was driving the company truck?
Q. Yes, sir, driving the company truck.
A. No, sir.
MR. REEDER: That's all.
EXAM. MYERS: Mr. McGee, how many pieces of equipment do you have leased to the Oklahoma Furniture Company now?
THE WITNESS: One tractor.
EXAM. MYERS: How many did you have leased prior to July?
THE WITNESS: One.
EXAM. MYERS: What's the period of the lease?
THE WITNESS: I believe, I am not positive, but I believe it's one year, sir.
EXAM. MYERS: That's all.
Any other questions?
You are excused.
(Witness excused.)
EXAM. MYERS: Let's take a short recess.
(Short recess.)
[fol. 171] EXAM. MYERS: All right, gentlemen, I guess we are ready to resume.
MR. REEDER: Mr. George Daves, please.

GEORGE FREEMAN DAVES

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Reeder) Will you state your name, please.
A. George Freeman Daves.
Q. Where do you live, Mr. Daves?
A. 600 Hill Drive, Guthrie, Oklahoma.
Q. Do you operate your tractor under lease agreement with the Oklahoma Furniture Manufacturing Company?
A. Yes, sir, I do.

Q. How long have you been so operating?

A. Since January '52.

Q. January 1952. You have operated that under all three vehicle lease agreements?

A. Yes, sir.

Q. That you heard stipulated and introduced in evidence. You heard Mr. Wiggins and Mr. McGee's testimony. Is your operation substantially the same as theirs?

A. Well, approximately, yes, sir. We have the same contracts, we have a different version of them, I suppose, but whenever I was driving for the company before I ever leased I did take my tractor home. I always have.

[fol. 172] Q. You mean you took the company-owned tractor home?

A. Yes, sir.

Q. You live in town, of course?

A. Yes, sir.

Q. Now, do you pay union dues?

A. No, sir.

Q. Do you carry a union card?

A. No, sir.

Q. Under your lease agreement you pay all the maintenance, all the repairs on your vehicle, all gas, oil and anti-freeze, tires?

A. Yes, sir.

Q. Oklahoma commercial license plates?

A. Yes, sir.

Q. Have you ever had any accident with your tractor?

A. Well, yes, sir, under the old lease agreement.

Q. Not under the new lease agreement?

A. No, sir, I haven't under the new.

Q. Is there any substantial change in any instructions from the company under the new lease agreement if you had an accident?

A. Well, you notify the company, the insurance adjuster, the Highway Patrol, and take care of it in the proper manner.

Q. That's what you did under the old lease agreement?

A. That's the way we have always done even when we worked for the company.

Q. Have you ever driven any other vehicle other than your own?

[fol. 173] A. Yes, sir.

Q. Under this lease agreement. When was that?

A. Under this new lease agreement?

Q. Yes, sir.

A. No, sir, I haven't, other than to, they have one or two boys that are rather new and their truck goofs off and they don't know what's wrong with it, I would change with them and try to determine what was wrong with the tractor.

Q. Change with them for what reason, I mean for a trip, a long trip or what?

A. Well, two of us went to—one of us went to Hobbs and the other one just below Hobbs, New Mexico, Eunice, New Mexico.

Q. Now, Mr. Daves, that wasn't at the instruction of the company to interchange?

A. Yes.

Q. Something happened on the road, is that correct?

A. No, we left together.

Q. You left driving his truck and he left driving yours, is that right?

A. That's right.

Q. Now, do you recall an interview with Supervisor Albert H. Douglas here on September 11, 1957?

A. Over the phone?

Q. Yes.

A. Yes, sir.

[fol. 174] Q. Do you remember telling him that you drive only your own vehicle for Oklahoma Furniture except in the event of extreme emergency, is that correct?

A. Sir, at the time I talked to him over the phone I think if he will recall I told him that the new contract, we wasn't too familiar with it, wasn't that right?

Q. Well, you just go ahead.

A. And in that, at that time that was my impression, yes.

Q. And you also told him that you could not remember an incident where you had operated other equipment or other lease equipment, is that correct?

A. Well, if I did I misrepresented things because I have two brothers and whenever I had the wreck last December I operated both of their trucks.

Q. Of course, they were your own brothers' trucks?

A. Well, that doesn't make any difference.

Q. What's the reason you don't belong to the union, Mr. Daves?

A. That's my own personal opinion.

MR. HANSON: If the Examiner please, if Mr. Reeder will examine the union contract it does not require a closed shop, and some of our employees belong and some do not, as their preference dictates.

Q. (By Mr. Reeder) Back to this statement that you operated other equipment under extreme emergency conditions, what conditions would be in your opinion an [fol. 175] extreme emergency that you would drive other equipment?

A. Well, as I say, in that statement there if I made it that way it was false, because an extreme emergency I wouldn't know what we would have to have to have one.

MR. REEDER: I don't believe I have any other questions.

CROSS EXAMINATION

Q. (By Mr. Hanson) Mr. Daves, you did, when you first came with the company drive a company truck, did you not?

A. Yes, sir.

Q. Was there any difference in the control which the company exercised over you in the route you would take and the things that you would do with that company truck, any difference in that and the way you are operating today?

A. No, sir.

Q. Now, you said when you had an accident you notify the company, the insurance adjuster and the Highway Patrol and ambulance, if necessary. You'd notify the insurance adjuster and the Highway Patrol and ambulance if necessary not matter what kind of an accident?

A. Yes, sir.

Q. If your own car—

A. Or anyone else, not even involved I would still do it, not the insurance adjuster.

Q. But if you were driving your own car and had an accident and had insurance you would notify the insurance adjuster?

[fol. 176] A. That's right.

Q. And you would notify the Highway Patrol?

A. Yes.

Q. And call an ambulance if one was necessary?

A. That's right.

Q. And if you had anyone with you you'd notify their family, wouldn't you?

A. Yes, sir.

Q. And in this case where you have got the company's tractor and the company's furniture, you are going to notify the company, aren't you?

A. That's right.

MR. HANSON: I believe that's all.

REDIRECT EXAMINATION

Q. (By Mr. Reeder) Mr. Daves, you receive your instructions to go out on a trip the same as Mr. Wiggins testified to, the bulletin board?

A. Yes, sir, or they call me.

Q. If you don't go on a trip you don't get paid, is that right?

A. I don't get paid, no, sir, I work by the mile.

Q. Now, when you work for the company if you reported for work you got paid whether you worked or not, is that correct?

A. No, sir, I drove by the mile.

Q. Are you familiar with the rate of pay of the company drivers of company-owned vehicles are under now at the present time?

[fol. 177] A. No, sir.

Q. And are not familiar with that?

A. That has all been changed since they—

MR. REEDER: All right, I believe that's all.

RECROSS EXAMINATION

Q. (By Mr. Hanson) Mr. Daves, you do now get two checks, do you not?

A. Yes, sir.

Q. And one represents the mileage on your truck and the other represents the mileage you drive?

A. Yes.

Q. If you drive someone else's truck then you only get a check for the mileage for your driving?

A. Yes, sir.

Q. And he gets a check for his truck, is that right?

A. That's right.

MR. HANSON: I believe that's all.

EXAM. MYERS: What did you mean, you said there was no difference when you worked for the company or when you leased your own equipment to the company, I believe was the question?

THE WITNESS: You mean as far as the mileage, the contract we have set up now and whenever we worked for them?

EXAM. MYERS: You said there wasn't any difference.

THE WITNESS: As far as I considered there isn't, sir.

EXAM. MYERS: Is there any difference in the pay? [fol. 178] THE WITNESS: The mileage pay, there's a penny difference, what it used to be whenever I worked for them and I drive for them now. I am still company employed, I work for the company.

EXAM. MYERS: When you worked for the company you were—whose equipment did you drive then?

THE WITNESS: I drove the company's truck but I still worked for the company.

EXAM. MYERS: But you are working for the company now under leased equipment, is that it?

THE WITNESS: Yes, sir.

EXAM. MYERS: And before you were working for the company as a straight employee and driving the company equipment?

THE WITNESS: Well, outside—

EXAM. MYERS: There is a difference, isn't there?

THE WITNESS: Yes, sir, there's a difference in it.

I understand, but we are still employed by the company. They pay us so much a mile for driving that truck or any other truck same as we did whenever we was driving the company truck.

EXAM. MYERS: Well, you are leasing your equipment now to the Furniture Company?

THE WITNESS: Yes, sir.

EXAM. MYERS: Would you drive one of their pieces of equipment if they should ask you to?

THE WITNESS: I'll drive anything out of there they bill me on.

[fol. 179] EXAM. MYERS: Today?

THE WITNESS: Yes, sir.

EXAM. MYERS: I have no further questions.

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Guild) Have you ever done that?

A. Sir?

Q. How often have you been driving company equipment?

A. I haven't been billed out of there on any other truck in some time, but any time—

Q. Since you have entered the lease agreement, is that correct?

A. Sir?

Q. Since you have entered this lease arrangement?

A. No, sir, I have drove company trucks since then.

Q. You have been interchanging driving company tractors?

A. Not regularly. One time my truck was in the shop and they billed me out on a company vehicle.

Q. One time?

A. Not necessarily one time. I have been billed out more than that.

Q. Many times?

A. Not too many, no, sir, I wouldn't say, not over a half dozen.

Q. What was the reason for using the company vehicle?

A. I said my truck was in the shop.

MR. GUILD: I see. That's all.

EXAM. MYERS: You are excused. Thank you.
[fol. 180] (Witness excused.)

BARNEY KENNEDY

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Reeder) Would you state your name, please.
A. Barney Kennedy.
Q. And you live at Guthrie?
A. Yes, sir.
Q. Do you work with or for the Oklahoma Furniture Manufacturing Company?
A. Yes, sir, that's right.
Q. What's your position there?
A. Truck superintendent.
Q. And shipping clerk?
A. Yes, sir.
Q. Are you also shipping clerk or head of the shipping department?
A. Yes, sir.
Q. How long have you been in this position, Mr. Kennedy?
A. About three years, I believe.
Q. Then you have been in charge of transportation and shipping through practically all three lease arrangements that were introduced in evidence?
A. Not completely, the first one was in force, I believe, when I taken it.
[fol. 181] Q. When a truck is brought in from a trip, what happens to it?
A. I have a man on the lot who is, I call him truck man or trailer man, and during daylight hours his instructions is to check that tractor over, give it a brief check of any defective things that he sees that's wrong with it. Many times a driver may be inside my office while this boy is checking it over and they might or might not be aware of it, and if anything is found defective in this equipment it has to be repaired before he goes back out.
Q. Who does the repairing?
A. Well, we have two garages there, we take some to both ones, that's O. B. Burst, International, and Crutchfield Motor.

Q. That's on the trucks, you take them there yourself?

A. We have taken some of the trucks, for instance, reports, the boy takes them from the lot; it's not always the case with all our trucks, sometimes the drivers take them up there.

Q. Who pays for the repair on these vehicles?

MR. HANSON: Will you separate it, Mr. Reeder, by—

MR. REEDER: Beg pardon?

MR. HANSON: Will you separate it by tractor and trailers?

Q. (By Mr. Reeder) Well, I mean the tractor vehicle.

A. If there's any repairs that needs to be done the drivers pay for those repairs, yes, sir.

Q. When did this kind of inspection start?

A. Well—

[fol. 182] Q. On the tractors there, on the tractor part?

A. Well, about since Mr. Douglas called on me last. I don't remember the exact date. He was very helpful in some of the things I hadn't been doing, complying with, since that date, I don't remember the exact time, but we have started doing it.

Q. Would that be about September 11, 1957?

A. I judge, yes, sir.

Q. Or October?

A. I don't remember the exact date. I think he might remember when he was over there.

Q. October 3, 1957.

A. That's on this taking them to the garage I am speaking about. The repair reports had been previous to that. Another gentleman by the name of Baptise, I believe, with the ICC.

Q. But the actual inspection of the company tractors by the company started after, since Mr. Douglas—I mean by the vehicle, the leased tractors, started after Mr. Douglas' visit?

A. Let me state it this way. We taken them to the garage and got a report written. We had them checked always before but as Mr. Douglas explained to me that was not in accordance with ICC regulations as we must have written report of that examination. They were taken before but only since that time do I have the written—

Q. Who took them prior to that?

A. Well, again I say sometimes the drivers, sometimes [fol. 183] Smith, who works on the lot.

Q. In most instances prior to this it was the driver who turned in the report?

A. I would say yes, sir.

Q. Of both the tractor and the trailer, is that correct?

A. No, on any of the drivers, any of them that works for me, they drop their trailers there and this boy will take the trailers all the time to the shop.

Q. Now, Mr. Kennedy, you have one vehicle owner-driver who lives in Kingfisher, or whose address is Kingfisher, is that correct?

A. He is deceased.

Q. Oh, he is deceased?

A. Yes.

Q. When did he die?

A. Well, I am awful poor at dates. I can't remember.

Q. Approximately; since the institution of this proceeding?

A. No, no, he was not alive, I don't believe, I believe he's been dead something like five months. I am guessing, approximately five months.

MR. HANSON: Which one was that?

THE WITNESS: That's W. We've got two Martins, either W. T. or W. M. W. M. Martin was his name.

Q. (By Mr. Reeder) Well, now, do you have one vehicle owner who lives at Edmond?

[fol. 184] A. Yes, sir.

Q. What happens when he comes into the company off the trip, what happens?

A. Well, it's no different than any of them that live in town as far as the operation.

Q. Does he drop the trailer and just take his truck on to Edmond?

A. He does if it doesn't need anything done to it. We have work done on his truck there in town at O. B. Burst, I think he has practically all of his work done there.

Q. But if nothing is wrong with it he is free to take the tractor on home?

A. Yes, sir.

Q. How far is it from Guthrie to where he lives, do you have any idea?

A. Oh, I imagine it's about fifteen miles.

Q. How do you get in touch with him in case you want to send him out on a trip?

A. The same as I do any other drivers. Sometimes I call him and sometimes I just put it up on the bulletin board and let him come up and look at it.

Q. Do all of these drivers work every day?

A. No, I wouldn't—not every day.

Q. You keep your trailers at the plant in Guthrie?

A. Yes.

[fol. 185] Q. But the company-owned tractors, where are they kept?

A. Just the same as the other boys, they take them home with them when they drop the trailer.

Q. All these drivers of company-owned vehicles live in Guthrie?

A. No, not in town.

Q. Well, I mean in the immediate vicinity.

A. Some of them is rural routes out of Guthrie, yes, sir.

Q. On September 11, Mr. Douglas interviewed you, Mr. Kennedy, and he stated that you stated in your interview that the maintenance and inspection of leased tractors is left completely up to the owner-operators, basing this on the theory that since the man owned the tractor he would be interested in seeing to its proper service and maintenance. Was that the procedure at that time?

A. Would you mind giving that to me again so I'll be sure?

Q. He stated, "My interview with Mr. Kennedy revealed that they have left the maintenance and inspection of leased tractors completely up to the owner-operators, basing this on the theory that since the man owned the tractor he would be interested in seeing to its proper service and maintenance."

A. I may have made that statement. I didn't know he was writing down what I was saying or I would have been more careful what I said. I might have made that statement. If he wrote it down, I can't say that I didn't. However, it's not true in its entire context as anybody [fol. 186] might make a statement sometime that wouldn't be exactly true, not giving careful thought to what he was saying.

Q. Well, what did you mean by those words, then?

A. Well, since I don't recall all, everything that taken place at that time, I couldn't tell you exactly what I meant. I can tell you what we do if that would clarify it any.

Q. Well, do you do the opposite of what you said in your statement, what this statement says you said?

A. No, regarding the equipment, I don't know what, whether at that time we were taking the trucks up, I don't remember exactly what time we changed. At the present time we do. I still am of the opinion that a driver, that there's not a driver that I have down there would take out a piece of faulty equipment. Nevertheless, as Mr. Douglas explained to me, it is necessary that we know and that we have it checked and have a report on it, but again, I say I really believe every driver down there would not take out a piece of faulty equipment knowing it to be so.

Q. Mr. Kennedy, you say when Mr. Douglas was—I believe the last trip to your company he picked up your inspection reports and photostated them?

A. Yes, sir.

Q. I believe at that time Mr. Douglas pointed out to you that there was very much a lack of any defects on any tractors reported by the drivers, isn't that true?

A. Yes, sir, that's right.

[fol. 187] Q. Often the drivers reported on the vehicle inspection reports defects on company-owned trailers?

A. That's true.

Q. So actually the company doesn't know whether, it doesn't seem right that the tractors would have no defects, does it?

MR. HANSON: Object to that as argumentative.

MR. REEDER: I am asking for his opinion. He is shipping clerk.

THE WITNESS: My opinion is this, if I may, since Mr. Douglas' visit, again let me say he came, I thought, at least in a helpful capacity, I still believe he did, and we have changed some of the repair reports. There have been, if you would care to check them since that date, have been filled out more completely. There was a letter put out to each driver explaining to them the necessity that each side, both the truck and the trailer, be filled out in

more detail. I believe that you will find that they are better. I will agree at that time, as I said and admitted to them, there had been a lax among turning them in on trips.

Q. (By Mr. Reeder) Up until Mr. Douglas' visit, in other words, you left the repair and maintenance of a tractor completely, or pretty much up to the driver, is that correct?

A. Mostly. Now, I'll say mostly, not altogether. I never would let a tractor go out knowing it was defective.

MR. REEDER: I believe that's all.

[fol. 188] CROSS EXAMINATION

Q. (By Mr. Hanson) Barney, you don't know of any ICC rule that requires a man to report a defect if it's not there, do you?

A. No, sir.

Q. Now, when the merchandise is loaded into the trailer, how is it loaded?

A. Well, sir, this is quite a long operation, do you want me to cut it down pretty small?

Q. I mean, take for example the order which is put in.

A. All right, the load is made up and in a concentrated area, preferably within a two hundred mile radius of delivery. The order that will, the customer that will come off last will be loaded in the nose of the trailer, and the order that comes off first naturally will be the last one loaded on the back of the trailer.

Q. Then is the man given the tickets to show what merchandise goes where?

A. He's given a bill of lading, we take the office bill, bill the load, it's just completely reversed as it is billed so that the bills coming out on top will be the ones on the back of the trailer and he will deliver from that.

Q. You said the bill of lading. You have what you call your truck bill?

A. Yes.

[fol. 189] Q. Your own truck bill?

A. Yes, sir, that's right.

Q. It's not the long form bill of lading that you find in the railroad?

A. No, that's just a term I used, probably wrong.

Q. Now, do you have in your office there—I don't know what you call it, but it's a routing book, I'd call it, which shows the various highway routes to each town?

A. I do.

Q. Now, does that show highway so and so to a certain point and then another highway and so on?

A. Yes, sir, it does.

Q. Is that the way, then, that you route these men?

A. They should have in their possession, they did have at one time if they haven't lost them, one of those route sheets and they had better take the short route, yes, sir.

Q. You have that and it shows for every town that you go to regularly, is that right?

A. I think so. There might be some town left off of it, but generally speaking it's every town.

Q. If it's left off of it you can come a portion of the way on that and then go off of it?

A. That's right.

Q. Now, the company-owned vehicles, Mr. Kennedy, are they routed the same way?

[fol. 190] A. Yes, sir.

Q. Are they loaded the same way?

A. Yes, sir.

Q. Now, are your company-owned vehicles inspected the same way?

A. Yes, sir.

Q. Mr. Kennedy, do you receive, have you received from the Interstate Commerce Commission any vehicle checks, whatever they call them, the slips?

A. Yes, sir, I have.

Q. Do they send those to you on both company vehicles and leased vehicles?

A. They do.

Q. Is there any difference in the way the ICC handles a roadside inspection, whether it's a company truck or a leased truck?

A. Well, as far as I know, there isn't. Now, Mr. Douglas would have to answer that. I am never out there when that's handled.

Q. I mean as far as the information which you get.

A. No, sir. As near as I can recall, it's all the same.

A. No difference. In other words, if they stop one of your trucks and inspect it, do they send to the Oklahoma Manufacturing Company a notice?

A. Yes, sir, they send a white copy to me.

Q. Now, in connection with this shipping operation, do the drivers sign for a load, sign for the cargo?

A. No, sir, they don't.

[fol. 191] Q. In other words, they don't sign any receipt for it?

A. No, sir.

MR. HANSON: I think that's all. Just a moment.

Q. (By Mr. Hanson) And that's true whether it's a company-owned truck or a leased truck?

A. That's true.

REDIRECT EXAMINATION

Q. (By Mr. Guild) Mr. Kennedy, do you have the right to hire and fire drivers?

A. Yes, sir, I do.

Q. And do you hire these drivers?

A. Yes, sir.

Q. I am speaking now both of the company-owned vehicle drivers and the leased operators.

A. That's true.

Q. You hire and fire both?

A. Yes, sir.

Q. Do you use any preference in using the company-owned vehicles before the leased vehicles?

A. No.

Q. How do you determine what type of load would go, who would take a load out? I understand now you have your company-owned vehicles take out the short hauls, is that correct?

A. Generally speaking, that's true. It's not always the case, but generally speaking they haul shorter trips.

[fol. 192] Q. And that's the reason why they are paid by—I believe the contract calls for fifty dollars a week plus a certain mileage?

A. Well, I don't know whether that's called, but that's the way they work, fifty dollars a week and two cents a mile.

Q. And two cents a mile?

A. Yes.

Q. They get that fifty dollars whether they operate ten miles or fifty miles, is that correct, or a hundred miles or a thousand miles?

A. That's true.

Q. And that's to compensate for their short hauls, generally speaking?

A. Yes.

Q. What happens if they don't operate at all, say during the week, do they get fifty dollars also?

A. Well, I have never had that happen.

Q. Would they? That's a salary, isn't it?

MR. HANSON: Just a minute, if Your Honor please, I think that's a question that probably this man would not ever be required to answer. It would be a decision on a higher level than his operation.

THE WITNESS: That's where I would take it at least, to a higher level.

Q. (By Mr. Reeder) You understood that fifty dollars is a salary, it's not based on a mileage basis, is it?

[fol. 193] A. Could I elaborate on it just a little bit, my interpretation of it?

Q. Surely.

A. Fifty dollars a week is—if they drew the fifty dollars a week and didn't drive any, it wouldn't be any good for them or the company, and if they drove two cents a mile it wouldn't be any good, it takes the two to work together to make the driver any money to live on. That's why it's thus set up.

Q. As I understand, you have six such drivers, company-owned drivers.

A. I believe that's right, yes, sir.

Q. And you have six company-owned tractors which they drive, is that correct?

A. Yes, sir.

Q. Are they all union members, the six company drivers?

A. Well, I can't be sure. I could check the records and see if they are union drivers.

Q. Would Mr. Walker know?

A. It's possible that Mr. Walker might know.

Q. Do you want to ask him right now?

MR. WALKER: What was the question?

THE WITNESS: If the company drivers are union members. I don't know if they pay dues into the union.

MR. WALKER: I don't know whether they pay it. It might be possible but we have no further records to [fol. 194] determine that, but to my knowledge, don't any of them pay dues.

MR. REEDER: I don't know about this dues paying, but are they under the union contract, Mr. Walker?

MR. WALKER: Yes, sir.

THE WITNESS: Every employee down there is under the union contract, yes, sir.

Q. (By Mr. Guild) What happened in this case where Mr. Daves took one of the company-owned tractors, do you have a driver, a company-owned driver assigned to each of these tractors?

A. Yes, sir, on all of my trucks, if I talk too much you can stop me, but I have to kind of explain, on all trucks I believe it's a good policy to leave a man on that truck and never, unless it's necessary, change that man from the truck, and any of my employees will verify that. It's necessary sometimes to change and I am not hesitant to put a driver on any of their equipment and vice versa. If you would care, I can name some of them. N. C. Newman took the company truck and went to, I believe it was Wichita. It was necessary that he do so.

Q. Why was it necessary?

A. I don't believe his truck was in. Now, Mr. Newman is here and could answer that question better. I don't remember exactly the nature of it, but there was another case, Wiggins was in port in another place and his tractor was there and I put T. C. Jones, I believe it was—

Q. That's an unusual circumstance, being caught. It [fol. 195] may not be for Oklahoma Furniture, but what would you consider the circumstances that gave rise to these lease operators operating a company tractor as you have stated?

A. Well, if their truck was broke down where they couldn't go and I had a company driver, say, that was ill,

in other words, I have got a truck there without a driver and that's what I consider an emergency.

Q. It would be an emergency or unusual circumstance, otherwise, why, you would try to keep the men to the tractors that they are assigned?

A. As I said before, I try to always keep every man on his assigned tractor.

Q. And there's an even more forceful reason for keeping a leased, under the leased operations the men who own the tractors, who is leasing it to the company to keep him on the tractor that he owns, isn't there? As I understand it, it's the company policy to try to keep that man with that tractor unit for such same basic reasons that you have mentioned in—

A. Yes.

Q. —in addition to the fact that of course he will treat his own equipment better?

A. I believe he will, yes, sir.

MR. GUILD: Thank you. That's all.

——— RECROSS EXAMINATION

Q. (By Mr. Hanson) Mr. Kennedy, do I understand [fol. 196] that you have, in your company-owned equipment you have a driver assigned regularly to each piece of equipment?

A. Absolutely.

Q. And he is the, ordinarily the driver on that?

A. Nobody else can drive that truck unless he is so assigned by me because he will take the truck out home and, as I have said before, it will only be in the case of necessity where I will put any other driver on the truck that he is assigned.

Q. And that's true whether it's a company-owned tractor or leased tractor?

A. That's true.

Q. There's no difference in your operation between the company-owned tractor and the leased tractor?

A. As far as I am concerned there isn't.

MR. HANSON: That's all.

EXAM. MYERS: How many pieces of equipment does the company own, Mr. Kennedy?

THE WITNESS: We have 26 trailers, sir, and we have six company-owned trucks and eleven leased trucks.

EXAM. MYERS: That's the total that you operate?

THE WITNESS: Yes, sir. That I am not counting bobtails, of course, around the plant there.

EXAM. MYERS: Do you have employees that are employed exclusively in the driving of your company-owned equipment?

THE WITNESS: Now, you mean company trucks?

[fol. 197] EXAM. MYERS: Yes, sir.

THE WITNESS: Yes, sir, they are employed exclusively to drive that particular truck, yes, sir.

EXAM. MYERS: In other words, how many drivers do you employ?

THE WITNESS: I am not trying to be evasive, sir, you see, I have the shipping department and the trucking department, too, and I don't know how many employees; I could say approximately. I have approximately seventeen truck drivers and approximately twenty to thirty men in the shipping department.

EXAM. MYERS: These seventeen truck drivers, are those—are you counting the leased trucks as—

THE WITNESS: I count them as an employee, yes, sir.

EXAM. MYERS: Those seventeen drivers, that's all the people that you employ for that purpose?

THE WITNESS: Yes, sir.

EXAM. MYERS: And they drive, they are both leased and owned?

THE WITNESS: Yes, sir.

EXAM. MYERS: I believe you said that this fifty dollars a week and two cents a mile, that is required to be of sufficient amount for the employee to live on, is that correct?

THE WITNESS: May I elaborate on that, sir? What I mean, if for instance you paid a boy fifty dollars a week and he run five hundred miles he might live on that, but the company hasn't made any money with him. It's [fol. 198] necessary that he get out and drive, make some miles, that's what the two cents a mile is, the two has to work together to compensate a fair salary. He must drive, I tell them when they are hired on that, approximately fifteen hundred miles a week to make a salary.

EXAM. MYERS: And all these drivers are paid on the same basis whether they are leased, operating their own equipment or whether operating the company equipment?

THE WITNESS: No, sir, they are not. It's a different rate of pay.

EXAM. MYERS: What's the difference?

THE WITNESS: Well, sir, the company drivers are fifty dollars a week and two cents a mile. The leased drivers—I have heard so many versions of this this morning that I'll try to get this straight—is ten cents for a single-axle trailer going out with furniture, five cents for the driver going out with a single-axle trailer, a penny for a, a penny more if it's a tandem.

On the haul back he gets thirteen cents for the lease of his tractor and six cents for the driving of that tractor if he has a haul back of our raw products we use in our plant.

EXAM. MYERS: Then he doesn't get any weekly salary?

THE WITNESS: No, sir, not unless he drives.

EXAM. MYERS: I believe that's all.

MR. GUILD: I have one or two other questions.

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Guild) Mr. Kennedy, for further clarification, [fol. 199] the drivers of the company-owned vehicles, they don't pay for the gasoline or the cost of parts?

A. They do not.

Q. Or the license plates for their vehicle?

A. No, sir.

Q. However, of course, as we have heard, the lease operators do, the drivers of the lease vehicles do?

A. That's true.

MR. GUILD: That's all the questions I have.

FURTHER RECROSS EXAMINATION

Q. (By Mr. Hanson) Since Mr. Guild asked you about the driver of the leased vehicle, the owners of the leased vehicles pay those expenses, is that right?

A. That's true.

Q. And the man who is driving regularly the company-owned equipment is normally on the short haul, is he not?

A. Generally speaking he is, he will make more short trips than long trips, long distance trips.

Q. Then he is normally home every night then?

A. Usually they try to get them home at night.

Q. Now, these men who drive the long haul over the road, where do those hauls go to, Mr. Kennedy?

A. Oh, my, it pretty well covers the United States. We go everywhere, almost.

Q. Well, they go to New York?

[fol. 200] A. They go to New York and as far west as New Mexico, we go as far north as, well, let's see, I believe Iowa. Of course, in the east we go through Ohio, Pennsylvania, cover a number of states.

Q. Now, do these trucks ever haul anything other than furniture or raw materials which is the property of Oklahoma Furniture Manufacturing Company?

A. They better not. I don't know of any cases they ever did.

Q. You have no arrangement to haul anything else for anybdoy else?

A. No, sir.

Q. Do you know of any instances where any man has hauled anything other than your products?

A. I do not.

Q. Now, do you haul a substantial amount of raw materials into the plant?

A. We do, almost every trip of any distance we will bring back a load of raw products.

MR. HANSON: That's all.

EXAM. MYERS: All these originated at Guthrie, Oklahoma?

THE WITNESS: Sir?

EXAM. MYERS: All your outgoing shipments originate in Guthrie?

THE WITNESS: Yes, sir.

EXAM. MYERS: And all your incoming materials would come into Guthrie?

[fol. 201] THE WITNESS: Yes, sir.

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Guild) Mr. Kennedy, do you ever use company-owned drivers on these leased vehicles?

A. Yes, sir.

Q. For long distance hauling?

A. Yes, sir.

Q. You send them out?

A. Yes, sir.

Q. And they get fifty dollars salary and two cents a mile?

A. Two cents a mile, yes, sir.

Q. Do they pay the gasoline and things like that out of their own pocket?

A. They do, but the owner of the vehicle has to reimburse that because he is getting the money for the lease.

Q. So that actually doesn't go to the driver, all he gets is fifty dollars and two cents a mile?

A. Fifty and two cents a mile.

MR. GUILD: No other questions.

EXAM. MYERS: You are excused. Thank you.

(Witness excused.)

MR. GUILD: Mr. Examiner, may we have five minutes?

EXAM. MYERS: Yes, we will take a short recess.

(Short recess.)

EXAM. MYERS: On the record.

[fol. 202] MR. GUILD: Mr. Walker, please.

ROBERT H. WALKER

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Guild) Would you state your name, please, sir.

A. Robert H. Walker.

Q. With whom are you associated, Mr. Walker?

A. The Oklahoma Furniture Manufacturing Company of Guthrie.

Q. What is your position with the Oklahoma Furniture?

A. Vice-president.

Q. You are vice-president?

A. Yes, sir.

Q. Where do you live, sir?

A. I live in Oklahoma City.

Q. How long have you been associated with Oklahoma Furniture?

A. Since 1934.

Q. Has it always been in an executive capacity?

A. Not the entire time. Possibly in the last 15 years.

Q. You have been in an executive capacity for the last 15 years?

A. That's right.

Q. So that you were an executive with the company when they owned all of the vehicles which transported the furniture?

A. Yes, sir.

Q. And you went through their bad experiences with the breaches of true that we stipulated to?

[fol. 203] A. Yes, sir.

Q. And you have been with them since. Mr. Walker, you remember coming by my office, oh, when was that, approximately a half year or so ago?

A. In Fort Worth?

Q. Yes, sir.

A. Yes.

Q. At that time and then again I understand your company has been in court several times and most recently you have appeared before a Federal Court in Arkansas?

A. Yes, sir.

Q. And you have been interviewed by Mr. Douglas?

A. Yes, sir.

Q. Now, isn't it true that on each of these occasions you have expressed that the company has a definite policy to have the owner-operators drive their own vehicles which are being leased by Oklahoma Furniture?

A. Yes, that's—

Q. For, if I understand it correctly, the reason—one of the reasons you have made the definite statement that you save money by having the owners operate their own vehicles?

A. That's correct.

Q. I don't know if you have ever expressed it, but in what way do you save money when you have the owner-operators?

A. Well, when a man owns his own equipment, why, it's [fol. 204] perfectly natural that he's going to be more particular with it, he's going to see that it's kept in good running condition, he's going to be very particular not to have an accident because if he should, why, it comes out of his pocket, and everything considered, why, our experience has proved that from every standpoint that you look at it the company is much better off where the owner of the equipment operates it.

Q. And has this policy been pursued, though?

A. Yes, sir, except in some cases where there was necessity to make changes.

Q. Well, you say you do pursue that policy.

A. Yes, sir.

MR. GUILD: That's all.

CROSS EXAMINATION

Q. (By Mr. Hanson) Mr. Walker, has this operation of leasing trucks resulted in a decreased expense in your operation of your company?

A. It has.

Q. Has your insurance loss experience been improved?

A. It has.

Q. Now, you had, as a matter of fact, you had two of these experiences where your drivers were padding their expenses, did you not?

A. That's right.

Q. I mean by two, you had one back in the late '30's and [fol. 205] then you had the one in 1951.

A. That's right.

Q. And in each of those cases substantially all of your drivers were involved?

A. All, I think, in each instance except one. I think there was one in each case that we couldn't prove anything on.

Q. What type of furniture does your company manufacture?

A. We manufacture a very low price line that sells to

the masses, in fact, it's about as low a price furniture as probably made in the entire country.

Q. Is the furniture business in that price range highly competitive?

A. Oh, yes.

Q. Now, is the saving in your truck operations both from the delivery of furniture and in the back haul of your materials a vital part of your operations?

A. It is.

Q. Mr. Walker, does your company in its trucks haul the products of anyone else?

A. No, sir.

Q. Have you ever hauled anything that belonged to anybody else?

A. No, sir.

Q. Now, in the pricing of your furniture, do you add a specific charge for transportation?

A. No, sir.

[fol. 206] Q. Is your pricing done on a zone basis?

A. That's right.

Q. And anyone within the zone gets the furniture at the same price?

A. That's right.

Q. Even though he may be further from Guthrie than someone else in the zone?

A. That's right.

Q. Actually, do some of your prices or your zones vary substantially? I am thinking particularly of New York, now?

A. That's right.

Q. Does New York actually take a lower price than an area, than some areas which are substantially closer to Guthrie?

A. It does.

Q. Why is that?

A. Well, it's—we do that in order to meet competition, in some areas where the competition is greater than others we naturally have to make a price to where we can sell our product, and that might be a greater distance than some other points.

Q. Specifically with reference to New York, do you have more back hauls from New York?

A. Yes, we do.

Q. And then by that you get your raw materials in at a better price and your over-all cost of taking your furniture to New York is lessened?

[fol. 207] A. That's right.

Q. Is your equipment, your trailers particularly, are they designed for the transportation of furniture?

A. They are.

Q. Is it economically feasible for your company to use any common or contract carriers?

A. It is not.

Q. What are the reasons that you can't use a common or contract carrier?

A. Well, there's various reasons. In the first place, the truck lines, common carrier truck lines, don't want to handle furniture, they are not equipped to handle it. Then there's another big reason, the matter of time. It takes sometimes four or five times as long to get a shipment to destination on a public truck line as it would on our own. Then there's other reasons that's very important, is the question of packing. Of course, low price furniture, it costs just as much to pack a ten dollar chest as it does a hundred dollar chest. Naturally, the percentage on low cost furniture is much greater. In our case on living room furniture, for instance, it probably will cost around ten per cent of the price to pack it. Of course, when we deliver it in our own trucks we don't use any packing at all on living room furniture, we use furniture pads, which enables us to sell at a considerable less price.

Q. Now, have you, or do you occasionally ship anything [fol. 208] by motor carrier?

A. Oh, yes, we can.

Q. What has been your experience, time-wise, with shipments by motor carrier?

A. Well, it's a considerable difference. I have cases there in my file, that one in particular is an LCL shipment we made to Columbia, Mississippi, which required 16 days for it to get there. Now, you can't ship anywhere for under, I'd say, three days, even to Tulsa, probably take two days to get to Oklahoma City unless you got a direct truck line.

Q. And if you shipped by truck line which doesn't have a certificate to go to the town that your merchandise is going to then it has to be trans-shipped?

A. That's right.

Q. And now this shipment you mentioned to Columbia, Mississippi, you didn't have a truck going at that time?

A. That's right.

Q. What would be about your normal operations from Guthrie to Columbia, Mississippi?

A. Oh, I would say it would be probably delivered the second day.

Q. And this shipment took 16 days?

A. That's right.

Q. Now, if you have a retail customer who wishes to put on a sale of merchandise and he purchases that from you for the purpose of that sale and you have to get it to him for that time?

[fol. 209] A. That's right.

Q. Do you now carry liability insurance on all of these vehicles?

A. Yes, sir.

Q. Have you always carried liability insurance?

A. Yes, sir.

Q. Now, under your prior lease arrangements did the driver pay the liability insurance for his truck?

A. Yes.

Q. Under this present lease who pays it?

A. The company pays the liability and property damage.

Q. Under both arrangements, however, have you placed the driver on the policy as the insured?

A. We have.

Q. Was that done for the greater protection of the public?

A. Yes, that's part of it, and then it, of course, cuts the cost down by putting it all in as a group instead of as individuals.

Q. Now, then, any time any of your equipment is in use if the wheels are turning then it's covered under that liability policy whether it's actually being operated on company business or not?

A. It's covered 24 hours a day.

Q. Yes, sir. Mr. Guild mentioned the conference which we had with him at Fort Worth. Has there ever been any suggestion by the Interstate Commerce Commission that we have not given them all the information which they requested and furnished them all the cooperation in [fol. 210] this matter?

A. We have.

Q. As a matter of fact, did we go to Fort Worth to seek their assistance in the proposition?

A. We did.

Q. I'll ask you if we could find anyone who could take the authority to tell us anything about our problem?

A. Not definitely, no.

Q. Have we brought here today at the request of the ICC all of these men, some of whom they have not used?

A. That's right.

Q. Has there ever been any contention made by the Interstate Commerce Commission that there was any subterfuge or evasion in connection with our operations?

A. There has not.

Q. Ever been any charge made that you hauled the merchandise of any other person or corporation?

A. There has not.

Q. Now, under the present arrangement you lease these trucks.

A. That's right.

Q. And then by your contract with the union you pay these men for their working time?

A. That's right.

Q. Are they now covered under Workmen's Compensation?

A. They are.

[fol. 211] Q. Are they covered under Workmen's Compensation both for their driving and for their maintenance?

A. They are.

Q. Do you pay Social Security on their wages?

A. We do.

Q. Do you comply with the withholding requirements on their wages?

A. We do.

Q. And insofar as possible do you comply with the ICC safety regulations?

A. We do.

MR. HANSON: That's all.

REDIRECT EXAMINATION

Q. (By Mr. Guild) Mr. Walker, I know that Oklahoma Furniture takes the position that the present arrangements are authorized and legal, but assume with me for a moment that they were unauthorized, you wouldn't consider the fact that it helped your company to remain competitive or it got the furniture where it was going quicker as justification for an unauthorized operation, would you, Oklahoma Furniture wouldn't take that position?

A. Well—

Q. Assume with me for a moment that it was unauthorized.

MR. HANSON: If the Examiner please, I think that's highly argumentative and I don't see the purpose of it.

MR. GUILD: Well, I don't see the purpose as to [fol. 212] bringing out the fact that it saved them time under this present arrangement and it helped them to remain competitive.

MR. HANSON: I'll be glad to state the purpose of that evidence if you would like to have it.

MR. GUILD: I don't want the counsel testifying. I just wanted to make certain that it wasn't in justification for any operation if it were considered unauthorized, assuming that it was unauthorized.

EXAM. MYERS: All right, let the witness answer.

THE WITNESS: Let me—you asked me that—ask me again. I don't—

Q. (By Mr. Guild) Assume with me for the moment that the operation was unauthorized, that the owner-operators were carriers performing a carrier service, you wouldn't consider the fact that it saved Oklahoma Furniture Company time or it helped them remain competitive in the furniture sale business that those factors would justify their entering into an unauthorized arrangement, would you?

A. Well, I'd answer that question this way, if the Interstate Commerce Commission ordered us to discontinue our present arrangement and the courts substantiated it we naturally would discontinue it regardless of whether it was inconvenient or cost more money to us or for any other reason, we'd naturally honor their order.

Q. So that what you are saying in effect is that saving [fol. 213] time or helping remain competitive in the furniture industry doesn't justify an unauthorized operation?

A. Well—

MR. HANSON: I think the witness has answered that.

THE WITNESS: You are assuming that it was unauthorized?

Q. (By Mr. Guild) Assuming that it was unauthorized.

A. It hasn't been shown it is yet.

Q. I say, assuming that it was.

A. Well, we think we would answer that when we got to that point.

Q. Speaking about court action, Oklahoma Furniture has been before the Arkansas authorities, and as I understand it, the Supreme Court of Arkansas has held one of their leases to be not adequate enough so that they held the owner-operators to be contract carriers.

A. They did on a prior lease. They have never held the present lease.

Q. Is that right? That decision, if I recall the date correctly, was December 10, 1956. Now, do you remember when the Supreme Court of the United States refused the writ on that, was it sometime in midsummer of this year?

A. I don't recall the date.

MR. GUILD: I think Mr. Hanson might confirm that.

MR. HANSON: That's approximately correct. I don't have the exact date here.

[fol. 214] Q. (By Mr. Guild) And it was subsequent to that refusal of the writ that you entered into another lease arrangement then, you re-drew a lease arrangement with the same men, is that correct?

A. That's right.

Q. And do you remember particularly what you changed in that lease arrangement?

A. Well, we, our prior agreement was that we lease the truck from the man and he—

MR. HANSON: Just a moment. Now, if the Examiner please, these agreements are all in evidence and comparison will show the differences. I don't think it is necessary for this man to compare them unless he wants to take them and compare them, which Mr. Guild can do as well as Mr. Walker can.

MR. GUILD: Of course this gentleman is speaking for the carrier and the carrier's attitude. I think we have had some evidence that the carrier said that he would—they would, if ordered by the Commission, terminate any type of operation that was considered illegal or anything that the courts might do, and I think it's pertinent, the fact that this company has been ordered to cease and desist, and then entered into another lease arrangement in which they change the leases around, continuing the same operators and same drivers and same vehicles again. I was wondering just what the company's opinion of this change, what did they do that made them within the framework of the Arkansas law again, put them within [fol. 215] the legal frame of the Arkansas law, and—

EXAM. MYERS: Doesn't your exhibits show the difference—

MR. GUILD: We have a comparison we can show the Examiner, yes, sir.

EXAM. MYERS: —forms of leases?

MR. GUILD: Yes, sir.

EXAM. MYERS: I think that's sufficient. The Commission can construe it.

MR. GUILD: If I may ask you this, Mr. Examiner, this new lease was drawn up in view of the court's refusal of the writ of certiorari, is that correct, Mr. Walker?

THE WITNESS: Not entirely.

Q. (By Mr. Guild) It was not?

A. No.

Q. You mean that didn't motivate this?

A. It was not the sole reason. We went down to your office in Fort Worth and discussed this prior contract, what was wrong with it, if there was anything wrong with it, and your main objection was that these men were not employees of the company and that we did not have the proper control over them, so that was one of our reasons to change the method and change the lease and

make them employees. Now, that was your suggestion.

Q. You mean that the Arkansas suit was not the motivating factor for drawing the new leases up?

MR. HANSON: He said it was not the sole—

[fol. 216] THE WITNESS: I don't think it was the sole reason, no.

Q. (By Mr. Guild) You mean you were taking our suggestion in drawing this new lease?

A. Well, yes.

Q. Did you understand, now, if I may review for you for just a moment, that we had expressed the fact that it's not so much what form you put it in words in the lease but when you go to these owner-operators and you seek a carrier service from them you are seeking a service rather than actually performing the operation yourself, that that is what, at least as I understand, as I expressed to you the Commission's decisions stand for, is the difference between a lawful and an unlawful operation, whether you are seeking a carrier service or whether you are actually trying to operate entirely a private carrier operation.

MR. HANSON: Now, if the Examiner please, I don't know whether that's a question or a statement by Mr. Guild, and I don't think the Commission's decision or the court decisions bear him out in that statement, and I don't think it's a proper question to be asked and if it's a statement I think it should be stricken.

MR. GUILD: Mr. Examiner, he stated that because of what I stated they put certain things in this lease agreement and if I remember correctly I told them that it was not merely the words of the framework of this lease, but it was the substance as to what they were really trying to [fol. 217] do so that I don't really feel that they, I don't know, I can't speak as to what they felt I said, but from my viewpoint nothing I said would have caused them to change particular wording on a lease, and it was this change in wording that I—

EXAM. MYERS: By changing the present lease that you are operating under now do you consider that will meet the rules and regulations of the Commission; is that right?

THE WITNESS: Yes, sir.

EXAM. MYERS: Then do I understand that your lease prior to this arrangement did not do that?

THE WITNESS: Well, we thought it did at the time we were operating under it and when we discussed it with the Interstate Commerce Commission in Fort Worth, why, they pointed out a few things there that they didn't think was legal and that one of the main ones was the fact that these men were not employees and they said that we didn't have the proper control over it, so that was one of our reasons for changing this to make them employees where there will be no argument whatever about control.

EXAM. MYERS: Well, do you think you are going to have control over them, more control over them now than you did previously?

THE WITNESS: No, sir, I don't think so. I think we had complete control over them before, but the Commission didn't seem to think so.

EXAM. MYERS: All right.

[fol. 218] Q. (By Mr. Guild) This new lease agreement was entered into in July of 1957, this year, was it not?

A. That's correct.

Q. And the Supreme Court's refusal of the writ occurred sometime in June or July of this year, isn't that correct?

A. I think it was prior to that, but I don't recall the exact date.

Q. I believe that's correct; June or July.

MR. HANSON: I don't have the exact date, but it was prior to the time we were in your office, yes.

Q. (By Mr. Guild) By virtue of that refusal, why, you were no longer allowed to operate under this arrangement in Arkansas, isn't that correct, Mr. Walker?

A. You mean of the prior lease?

Q. Well, then, the Arkansas decision when it stood up before the Supreme Court of the United States it enjoined you from operating in that state under those arrangements?

A. That's correct.

Q. And then you drew this new lease up?

A. Yes, sir.

MR. GUILD: That's all.

RECROSS EXAMINATION

Q. (By Mr. Hanson) As a matter of fact, Mr. Walker, when we originally set up the lease arrangement didn't we consult with the ICC motor carrier man in Oklahoma City?

[fol. 219] A. We did.

Q. And did we at that time attempt to meet his objections to the first one that we prepared?

A. We did.

Q. And I'll ask you if the conference with Mr. Guild was not set up by our own actions, we didn't write down there actually, I think we directed the letter to Mr. Douglas, and suggested that we would like to confer with them on this matter since the Supreme Court had held against us in the other matter?

A. That's correct.

Q. So that at all times we have been trying to meet their ideas on the matter and still stay in business?

A. That's right.

MR. HANSON: That's all.

MR. GUILD: No further questions.

EXAM. MYERS: Mr. Walker, who pays the freight on this, on the shipments of furniture, is that passed on to the customer?

THE WITNESS: Well, that depends on how it's shipped. Where we ship on our own truck, why, of course we make it delivered price separated in zones.

EXAM. MYERS: Is there a cost of transportation involved there?

THE WITNESS: Well, yes, it's naturally some cost because it costs money to haul furniture regardless of how you haul it or how far you haul it to.

[fol. 220] EXAM. MYERS: When you used these leased operators, or when you use them, is the cost of the transportation added to the furniture to the customer?

THE WITNESS: No, sir, no difference between the lease and the other, they are both the same.

EXAM. MYERS: Then am I to understand that the cost of transportation under your present arrangements is less than it would be under a common carrier arrangement?

THE WITNESS: Oh, considerable less.

EXAM. MYERS: Is that your main reason for wishing to continue this so-called private operation you have?

THE WITNESS: No, sir, that's just one of the reasons. We have a lot of other reasons. One of the main reasons is the cost of packing, which any shipment that we make over a common carrier it has to be packed according to certain specifications, and that cost is a considerable amount of money. Where we ship on our own trucks, of course, we don't use that method of packing, we, on upholstery furniture we don't use any, we use furniture pads which are of course used over and over. On our case goods, bedroom furniture, we do use a very light carton which doesn't cost a third as much as a carton would cost if we had to ship it over a common carrier.

EXAM. MYERS: Don't you have common carriers available that transport furniture uncrated?

THE WITNESS: We have, I believe, one that operates [fol. 221] west, and he does haul furniture uncrated but at a very high rate that he has a higher rate for uncrated than he does for crated.

EXAM. MYERS: Does North American Van Lines serve Guthrie?

THE WITNESS: I really don't know whether they do or not.

EXAM. MYERS: I believe that's all I have.

Any further questions?

MR. HANSON: Yes, sir.

Q. (By Mr. Hanson) Mr. Walker, I think what the Examiner wished to know, there is no separate charge on the billing either for by the company truck or by leased truck for delivery.

A. No, sir.

Q. Did Mr. Douglas pick up a large quantity of your invoices and trips and truck bills and so forth and examine them some time back?

A. Yes, sir.

Q. They had those and photostated them, I believe.

A. I think that's correct.

Q. So they have the full information as to the manner in which it is charged and the man's logs and all of that?

A. That's correct.

MR. HANSON: That's all.

MR. GUILD: No further questions.

EXAM. MYERS: You are excused, Mr. Walker, thank you.

(Witness excused.)

MR. REEDER: We have one more witness, Mr. Ex-
[fol. 222] aminer. Do you want to hear him before lunch?

EXAM. MYERS: Yes.

MR. REEDER: Mr. Douglas.

ALBERT H. DOUGLAS

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Reeder) State your name, please.

A. Albert H. Douglas.

Q. Where do you live?

A. Fort Worth, Texas.

Q. You are employed by—?

A. The Bureau of Motor Carriers, Interstate Commerce Commission.

Q. You have been so employed for how many years?

A. I went to work for the Commission in 1951. I left their service for approximately one year.

Q. Back in 1952?

A. And came back. No, I left in '54 and came back in '55.

Q. You have investigated the operations of the Oklahoma Furniture Manufacturing Company and the eleven individuals respondent to this proceeding?

A. I have.

Q. You first made an investigation when?

A. My original investigation started in November of 1956.

Q. At that time they were operating under the lease which has been admitted as an exhibit in this proceeding, [fol. 223] the first lease that has been admitted, is that right?

A. No, sir, I do not believe it was the first lease. The

one under which they were operating at the time of my investigation was, I believe, the second lease.

Q. It's the lease that's been introduced into evidence at this hearing?

A. Yes, sir, that is correct.

Q. As the initial lease?

A. As the one just prior to the one which they are operating now.

Q. Now, you have made a further investigation of the operations of the Oklahoma Furniture and the eleven individuals since that time?

A. Yes, sir, in fact two additional checks have been made, one on September 11 and again on October 3, 1957.

Q. (Mr. Reeder) Did you look over the vehicle condition reports turned in by the drivers, both company and leased vehicle condition reports for the months of June, July and August 1957 on one of your investigations?

A. Yes, sir, I did.

MR. HANSON: Must a minute. I'd like to ask the purpose of that and object to it because there is no contention here, no issue made of our safety practices or compliance. The only issue here is whether or not we are operating as a private carrier, and I don't think you should broaden this into any safety hearing.

[fol. 224] MR. REEDER: Mr. Examiner, we are not attempting to bring in a non-safety feature. All we are trying to show is that the amount of control the company had over the vehicles and the drivers driving these vehicles.

EXAM. MYERS: All right, I'll overrule the objection.

Q. (By Mr. Reeder) Do you have copies of those vehicle inspection reports, Mr. Douglas?

A. No, I do not. They were photostated.

Q. You did photostat those copies?

A. Yes, sir.

Q. Did you summarize your examination of the vehicle condition reports?

A. I did, sir.

Q. Do you have your summary of that?

A. Yes, sir, I do.

Q. What did it show for the month of June 1957?

A. During the month of June I was able to locate not all of them but at that time it would be difficult to determine whether that represented all of those that had been reported but they were all that were available at the time of my investigation, and that represented 16 vehicle condition reports that had been submitted.

Q. That was by both company and—

A. That was by both company and leased operators.

Q. How many defects on company tractors were re-
[fol. 225] ported for the month of June?

A. Two.

Q. How many defects on leased tractors were reported for the month of June?

A. Two.

Q. What were those defects?

A. I would have to refer to the photostats because I did not show the, what the defects were on the summary.

Q. What about the company-owned trailers, how many defects were reported?

A. Ten.

Q. Ten defects?

A. Yes, sir.

Q. Now, for the month of July how many vehicle condition reports did you find?

A. Twenty-three.

Q. How many defects were reported on leased vehicles?

A. None.

Q. How many on company-owned vehicles?

A. On company-owned vehicles, trailers, twelve.

Q. Now, on the month of August you picked up all the vehicle condition reports in the office at that time?

A. Yes, sir.

Q. That was after the month of August, wasn't it, that you made this investigation?

[fol. 226] A. Yes, sir.

Q. September 11?

A. No, sir, that was on October 3.

Q. October 3, all right. How many vehicle condition reports were on file at the office of the Oklahoma Furniture?

A. Eight.

Q. How many defects on leased vehicles were reported?

A. Three.

Q. How many on company-owned vehicles?

A. Four.

Q. Were these all—thus was the entire, these eight reports were all that was in the carrier's office for the month of August, is that correct?

A. Yes, sir, that's correct, that's all we could locate at the time.

Q. Mr. Douglas, did you ask an official of the company at that time why all the defects, most of the defects were showing up on company-owned vehicles rather than leased vehicles?

A. Yes, sir, it was discussed at some length with Mr. Kennedy, a' —

Q. What was the answer to that?

A. Well, it was explained that he had a man employed as, primarily, a service man for the trailers, that when a unit came in, tractor, semi-trailer, that the trailer was dropped by the driver, the tractor—

[fol. 227] Q. That's a leased vehicle?

A. Leased vehicle, yes, sir, and then the service man immediately took charge of the trailer. The leased operator was taking care of his own maintenance, therefore he went on his own way with the leased tractor, but he did leave a notation on the—for that reason he was putting a notation as to defects on the trailer so that the service man would know, but not on the tractor portion of the vehicle condition report.

MR. REEDER: I believe that's all.

CROSS EXAMINATION

Q. (By Mr. Hanson) Mr. Douglas, has the ICC at various times inspected these various vehicles, both company and leased vehicles?

A. Yes, sir.

Q. Have they ever found any serious defect in any of this equipment?

A. I am not familiar, I didn't make all inspections, sir, and I couldn't say with any authority.

Q. As far as you know?

A. As far as I—well, I just really have no knowledge. I believe I inspected one in the past 18 months that I remember. I do not believe there was anything seriously wrong with that.

Q. Now, as a matter of fact, you make a lot of these checks from private carriers, common carriers and contract carriers, do you not?

A. That's right.

[fol. 228] Q. Insofar as keeping the records is concerned, are we any better or any worse than the rest of them at that time?

A. I have checked some better and some worse.

Q. So far as you know now the records are being kept better than they were, you heard Mr. Kennedy's testimony here this morning?

A. Yes, sir, that has been an improvement.

Q. Now, when you make a check or when you check there or on the road, who do you look to for the correction of that defect, the Oklahoma Furniture?

A. It all depends, sir. I don't know if you have ever noticed on the inspection report right next to the description of the vehicle there is a kind of code number, so while we would put down as the name of the carrier the Oklahoma Furniture Manufacturing Company with the address at Guthrie in this particular instance we would determine if that was a long-term lease and if you will notice on your copy of the report that there is a little "two" which indicates that the vehicle is being operated under a long-term lease which in the case of a follow-up, why, the investigator would have that information so it's not handled exactly the same way as a vehicle operated by and owned by a company.

Q. Where do you send the notice?

A. Have two ways, sir; the last copy is handed to the driver immediately and he is supposed to turn that in to [fol. 229] whoever is in charge of the maintenance.

Q. He gets that copy no matter what his arrangement with the company is?

A. That is correct.

Q. All right.

A. Then another copy is mailed overhead to the carrier as shown at the top of the inspection report.

Q. Now, you do look to the Oklahoma Furniture for the records and for the record keeping, do you not?

A. Well, of course, that depends, sir. I think one of the reasons that we started the investigation was on account of some of the road inspections that we made had indicated that the owner was also driving the equipment.

Q. But on these records that you have been checking up there you looked to Oklahoma Furniture to keep those records, isn't that right?

A. They have claimed—

Q. Mr. Douglas, just answer my question. That's where you went, wasn't it?

MR. GUILD: I think that's argumentative as to whether the witness looked to the Oklahoma Furniture. The question was that Oklahoma Furniture had those records.

MR. HANSON: Let me change the question.

Q. (By Mr. Hanson) You went to Oklahoma Furniture, didn't you, Mr. Douglas, for the records?

[fol. 230] A. I did.

Q. You didn't go to anyone else, to any of these drivers and say, "I want to see your records which you keep as a contract carrier," did you?

A. No, sir, because it was claimed to be a valid lease arrangement, which we, of course, were questioning.

Q. Now, any of the information which you have requested from them has been furnished to you, has it not?

A. Yes, sir, it has.

Q. Did you sometime last year get a lot of the records of shipments?

A. Yes, sir, I did.

Q. Did you find in every instance there that there was no separate charge for delivery?

A. If my memory serves me correctly, there was no separate charge for delivery.

Q. And you had the truck bill and the invoice and the man's log for his trips, didn't you?

A. I believe that's correct, sir.

Q. And those were the ones which you came to Oklahoma Furniture and asked for?

A. That's correct, sir.

MR. HANSON: That's all.

EXAM. MYERS: You are excused, Mr. Douglas. Thank you.

(Witness excused.)

[fol. 231] MR. HANSON: I was going to put on one more witness since they used Mr. Walker and Mr. Kennedy, there is one truck driver they didn't use I would like to put on very shortly.

EXAM. MYERS: Do you think we can finish before we eat?

MR. HANSON: I thought we might take ten minutes and be through.

EXAM. MYERS: It's all right with me.

N. C. NEWMAN

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hanson) State your name, please.

A. N. C. Newman.

Q. Mr. Newman, how long have you been with the—well, first, where do you live?

A. Guthrie, Oklahoma, 250 North First.

Q. You are employed by the Oklahoma Furniture Manufacturing Company?

A. Yes, sir.

Q. How long have you been with that company?

A. About ten years.

Q. Did you start with the company driving a company vehicle?

A. Yes, sir.

Q. How long did you drive a company vehicle?

A. About five years or a little longer.

Q. And I believe then that you have progressed through [fol. 232] all of the various leases which we have had?

A. Yes, sir.

Q. Mr. Newman, is there any difference in the instructions which you received as to the route and the delivery of the furniture when you were driving a company truck and those which you have received under the present ar-

rangement where you lease your truck and also work as an employee?

A. No, sir.

Q. Now, you do now receive two checks?

A. Yes, sir.

Q. And you are covered under Workmen's Compensation?

A. Yes.

Q. Social Security is paid on your earnings under the contract of employment?

A. Yes, sir.

Q. And the withholding for income tax?

A. Yes, sir.

Q. Did you, when you were driving a company truck, take that vehicle home with you?

A. Yes, sir.

Q. Do you now take your own vehicle home with you?

A. Yes, sir.

Q. Have you, under the present lease and employment contracts, have you driven any other trucks other than your own?

A. Yes, sir.

[fol. 233] Q. What have you driven?

A. Just about two weeks ago we traded off and I went to—

MR. GUILD: Would you speak up, please?

A. (Continuing) —just about two weeks ago we traded off and I went to Wichita, one of the company drivers took my truck down in Texas, to Austin, Texas.

Q. And you took a company truck and the company driver took your truck?

A. Yes, sir.

Q. By company driver you mean one who would be regularly assigned to the company truck?

A. He was driving a company-owned tractor, I mean.

Q. Yes, sir. What was the particular occasion for that?

A. I had just got off the road and the way I understand it that Austin load had to be there the next morning and I had to have my rest, I couldn't go out.

Q. So he took your vehicle and then later you took his?

A. Yes, sir, I went out the next morning.

Q. When you were driving a company vehicle were you normally assigned to the same tractor all the time?

A. Yes, sir.

Q. As a matter of fact, is that ordinary practice in the operation of trucks?

A. That's the practice with all trucking companies that I was ever connected with that I know anything about. [fol. 234] Q. Insofar as possible they leave one man on one vehicle?

A. Yes, sir.

MR. HANSON: That's all.

CROSS EXAMINATION

Q. (By Mr. Guild) What companies were you associated with, Mr. Newman?

A. I drove for the Guthrie Cotton Oil Company.

Q. Continental?

A. Guthrie Cotton Oil Company for ten years. I was with Fairmount Creamery for a even shorter time, just for a while.

Q. What did they do?

A. Transported cream and then the products of milk and cream and ice cream.

Q. Are these all private carriers?

A. No, it's—yes, sir, private carriers.

Q. And this was an unusual situation where you drove the company vehicle and somebody else drove your vehicle?

A. Well, not necessarily, it's just—

Q. You mean it's contrary to what Mr. Walker stated that it's the policy of the company to keep the man with the same vehicle, his own vehicle?

A. That's right.

Q. So it would be unusual for you to. You were with the company when they had this bad experience concerning the drivers buying cigarets and using company gasoline for their own purposes?

[fol. 235] A. Yes, sir.

Q. Were you driving one of the company-owned vehicles at the time?

A. Yes, sir.

Q. Were you the one man that was cleared?
A. I was the one survivor.
Q. I want to congratulate you.
MR. GUILD: That's all.
MR. HANSON: That's all, Mr. Newman.
EXAM. MYERS: You are excused.
MR. HANSON: That's all we have.
EXAM. MYERS: Anything further?
MR. REEDER: That's all.
EXAM. MYERS: Do the parties wish to file briefs in the case?
MR. GUILD: Yes, sir.
EXAM. MYERS: All right, we will set a brief date. What do you want, thirty days?
MR. REEDER: We need at least thirty or forty days.
EXAM. MYERS: Off the record.
(Discussion off the record.)
EXAM. MYERS: On the record.
Briefs will be due January 15.
There being nothing further, the hearing is closed.

(Thereupon, at 12:30 p.m., the hearing in the above-entitled matter was closed.)

[fols. 236-270] • • • •

[fol. 272] EXHIBIT 1

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2143

IN THE MATTER OF
OKLAHOMA FURNITURE MANUFACTURING COMPANY, ET AL—
INVESTIGATION OF OPERATIONS

AGREEMENT AND STIPULATION

It is hereby agreed and stipulated by and between the Bureau of Inquiry and Compliance, Oklahoma Furniture Manufacturing Company, a corporation, hereafter referred to as "Oklahoma Furniture," or "the company," and Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles McGee, Todd Shinn and William M. Martin, hereafter referred to as "individual respondents," that the following facts are true and correct and may be introduced into evidence at the hearing in the above-captioned proceedings, subject only to the objection of any party to the materiality of said facts. It is further agreed and stipulated that the documents hereto attached may be introduced into evidence as part of the record of the proceedings without further proof of their authenticity, save and except the parties hereto retain the right to object to the materiality of such documents.

[fol. 273] 1. Oklahoma Furniture is a Delaware corporation with its principal place of business, a furniture manufacturing plant located at Guthrie, Oklahoma. The primary business of the company is the manufacture and sale of low price furniture sold to retail dealers throughout the United States. All shipments of its products are made from its Guthrie plant. The officials of Oklahoma Furniture are: Lewis B. Morrow, president; R. H. Walker, vice-president; and L. M. Poer, secretary-treasurer.

2. The individual respondents reside at or near Guthrie, and are all residents of the State of Oklahoma. Each of the individual respondents own a tractor which is operated under a lease arrangement with Oklahoma Furniture. A representative copy of the vehicle lease arrangement between Oklahoma Furniture and the individual respondents is marked Appendix "A" and is attached hereto and made a part hereof for all pertinent purposes. The operation of the tractors of the individual respondents with the trailers of the company is in the interstate transportation of the companys' furniture from its plant at Guthrie, Oklahoma, to retail furniture dealers located at different points throughout the United States, generally East of the Rockies; and the back haul of raw materials used by Oklahoma Furniture in the manufacture of its furniture.

3. The respondents are not authorized by the Interstate Commerce Commission, individually or collectively, to engage in the transportation of property either as contract [fol. 274] carriers or common carriers by motor vehicle in interstate or foreign commerce, and have made no application for such authority.

4. Oklahoma Furniture owns and operates six (6) tractor units which it employs in the local and short distance interstate transportation of its furniture. It employs six (6) salaried drivers to operate the said company-owned tractors. The company owns all of the trailers employed in the transportation of its furniture and back haul of its raw materials.

5. Prior to 1952, Oklahoma Furniture performed the transportation of furniture in company-owned vehicles operated by employees of the company. In 1951, Oklahoma Furniture suspected that it was being defrauded by its drivers. These drivers had been furnished gasoline credit cards for the purpose of charging truck expense on the road. The company hired detectives and conducted an investigation and found that of 13 drivers, 12 were defrauding the company by padding gasoline tickets. For example, a man would actually buy 80 gallons of regular gasoline but would obtain a ticket charging the company with 100 gallons of ethyl gasoline, getting the difference

in cash. The company computed its loss over a three-year period at approximately $27,000, and recovered substantially all this amount from various filling stations and from a bonding company. This investigation disclosed, in addition to the padding of gasoline tickets, that gasoline was being placed in the employees' own personal cars, [fol. 275] that repairs on employees' own personal cars were being charged to the company, and that cartons of cigarettes were being charged to the company as 10 gallons of gasoline for each carton. After this investigation, Oklahoma Furniture discharged all of its drivers, with the exception of the one that was cleared.

6. Thereafter, Oklahoma Furniture determined to change its operations to a system whereby the driver would own and maintain his own truck, which would be leased to the company with the driver being paid upon a mileage basis with an adjustment for back hauls. In carrying out this purpose, a lease was drawn, to be signed by each driver.

The principal reason Oklahoma Furniture changed its operations to the lease agreement was to avoid drivers' breaches of trust, and to reduce its cost of operation. It was the opinion of the company management that there would be no incentive for a driver to pad gasoline tickets which he himself had to pay. Its records indicated that there were minor repairs that were due to poor maintenance by the driver being made at excessive prices. It was the opinion of the company management that a man operating his own tractor would operate it more carefully and be more careful to properly maintain said tractor when he was responsible not only for the cost of maintenance but for any deterioration on said vehicle due to improper maintenance.

7. The initial lease agreements, a representative copy of which is attached hereto and marked Appendix "B" for all pertinent purposes, were canceled by subsequent lease [fol. 276] agreements, representative copies of which are marked Appendix "C" and attached hereto for all pertinent purposes.

8. On or about , 1957, the lease agreements described in paragraph (7) above were canceled and the

present lease arrangements referred to in paragraph (2) above were entered into between Oklahoma Furniture and the individual respondents.

Further, Oklahoma Furniture negotiated with the United Furniture Workers of America, A.F.L.-C.I.O., Local Union No. 272, to include individual respondents in a union contract covering rates of pay, working conditions, and fringe benefits. A copy of the union contract of December 14, 1956, together with the amendment of July 15, 1957, are marked Appendix "D" and attached hereto for all pertinent purposes. Since the execution of the union contract the company has paid social security upon the wages of the individual respondents, and has provided Workmen's Compensation benefits as required by the laws of the State of Oklahoma, and have withheld from the individual respondents' earnings withholding tax as provided by law.

9. Subsequent to the institution of the captioned investigation proceedings by the Interstate Commerce Commission, Robert Custard, one of the vehicle owners, terminated his vehicle lease contract with Oklahoma Furniture, and said company entered into another lease arrangement with Charles McGee, of Route 4, Guthrie, Oklahoma. It is [fol. 277] agreed and stipulated between the parties hereto that said Charles McGee shall be substituted in the place of Robert Custard, and made a party to this investigation proceeding.

10. It is stipulated and agreed that by entering into this stipulation the respondents do not admit the jurisdiction of the Interstate Commerce Commission or of the Examiner to conduct this hearing.

11. It is stipulated that any party to this proceeding may introduce any additional evidence upon the hearing of this cause.

OKLAHOMA FURNITURE MANUFACTURING COMPANY
MARION W. DAVES
HENRY E. DRUM
N. C. NEWMAN
A. D. WOODARD
GEORGE F. DAVES
OSCAR DAVES
ARCHIE NORRIS
EUGENE WIGGINS
CHARLES McGEE
TODD SHINN
WILLIAM M. MARTIN

By: .....
WALTER D. HANSON
Attorney for Respondents.

.....
LLOYD R. REEDER, Attorney,
Bureau of Inquiry and Compliance,
Interstate Commerce Commission,
816 Texas & Pacific Building,
Fort Worth, Texas.

[fol. 278] EXHIBIT 2

EQUIPMENT LEASE AGREEMENT

Now, on this ..... day of ....., 19....., it is agreed by and between the Oklahoma Furniture Manufacturing Company, a Delaware Corporation, having its principal office in Guthrie, Oklahoma, herinafter referred to as "Company", and ....., a resident of the City of ....., State of ....., hereinafter referred to as "Lessor", as follows:

(1) Company is engaged in the manufacture of furniture and as an icident thereto the transportation of its own products, raw materials and machines to and from its customers and suppliers in various parts of the United States, and desires to obtain by lease and have operated in its business certain motor vehicle equipment owned by Lessor.

(2) That the Lessor is the owner of certain motor vehicle equipment described in Schedule A attached hereto, and made a part hereof, which equipment is available to be operated in the Company business under this agreement.

(3) The Company hereby leases from the Lessor the motor vehicle equipment described in Schedule A hereto attached, and made a part hereof, and such additional equipment as may hereafter be specifically endorsed on said schedule.

(4) It is agreed that as the sole rental and consideration for the use of said motor vehicle equipment the Company agrees to pay the Lessor rent as follows:

[fol. 279] *10 cents* per mile for each mile traveled as hereinafter computed.

Where tamdem trailer is furnished by the Company to be pulled by the Lessor's equipment, the rate shall be *13* cents per mile for each mile traveled as hereinafter computed.

In addition thereto, on return loads of material which the Company purchases from others in the operation of its business, the Company will pay an additional 3 cents per mile on the back haul. Return merchandise shall not be considered as a return load for the purpose of this agreement.

(5) The mileage referred to in paragraph (4) above is to be computed upon the regular highway mileage upon reports turned in by Lessee's driver; such reports to be audited by the Company at its office in Guthrie, Oklahoma, and by Lessor and subject to correction in favor of either party in the event it does not conform to the highway mileage.

Payments under this agreement shall be made weekly.

(6) The motor vehicle equipment covered by this agreement shall be operated by an employee of the Company who shall be properly qualified and physically fit in accordance with state and federal regulations.

(7) It is agreed that the consideration set forth in paragraph (4) is the sole rental and consideration for the use of such motor vehicle equipment, and the Lessor shall pay all operating costs arising from the operation of said vehicle equipment, including cost of gasoline, oil, [fol. 280] grease, and cost of parts. Lessor further agrees to pay cash for all expenses and to permit no charges to be made to himself or to the Company.

The Lessor shall at his own sole expense procure Oklahoma commercial license plates to be used on said leased equipment.

Lessee agrees to keep and maintain said motor vehicle equipment at all times while in operation under this lease in first-class operating condition and in complete compliance with all safety rules and regulations of all state and federal regulatory bodies.

In the event of the failure of Lessor to pay the operating cost of such equipment, the Company may at its sole option cancel this agreement forthwith, or at its option pay the necessary operating costs and expenses and

charge the same to the Lessor's account with the Company.

(8) The Company shall have sole control, right of direction and use of the leased vehicle equipment, and covenants with the Lessor that all uses will be lawful, and further that all property transported by the leased vehicles shall belong to the Company, and that the Company will not sub-lease said equipment to any other person, firm or corporation.

(9) Lessor warrants that during the life of this agreement he will not suffer or allow said leased equipment to be in any way restricted by liens, encumbrance, mortgage, or held as security for any debt or obligation except with the express and written consent of the Company.
[fol. 281] It is expressly understood and agreed that the Company shall retain from all rental compensation to be received by the Lessor five per cent (5%) thereof, said amounts to be retained by the Company until the amount of One Thousand Dollars ($1000.00) has been retained. The Company shall have the right to charge against said fund any expense which it is forced to pay for the account of the Lessor, or any other sums due the Company under this contract, and in the event said fund is depleted below One Thousand Dollars (1000.00) shall have the right to make further deduction of five per cent (5%) from rental compensation until such fund again reaches the sum of One Thousand Dollars ($1000.00). Upon the termination of this agreement, said fund, less any proper charges by the Company, shall be paid to the Lessor.

(10) In consideration of the rental provided herein, it is agreed that the Company shall not be liable to the Lessor for wear, tear and depreciation resulting from the use of said leased equipment, nor shall the Company be liable for any damage caused to said leased equipment by accident, theft, fire or any other hazard or casualty, or by the acts of the Lessor, or his employees, or by the acts of third parties, or resulting from acts of God, or events beyond the control of the Company.

(11) Lessor shall not be responsible for loss to Company equipment, property and cargo.

(12) Company will have the name of the Lessor endorsed as an additional assured upon its policies of property damage and public liability insurance covering the [fol. 282] operation of motor vehicles. The Company shall not carry collision, fire, theft, or any other type of insurance for the account of the Lessor, and if the Lessor carries such insurance, it shall be at his sole cost.

(13) It is mutually understood and agreed that the Company may cancel this agreement forthwith upon any material breach of the provisions of this agreement by the Lessor, or in the event that the Company is requested or instructed by its insurance companies, or any regulatory body having jurisdiction over these operations to discontinue the use of the leased equipment. Either of the parties hereto shall have the right to cancel this agreement for any other cause or reason whatsoever upon the giving of a thirty (30) day written notice to the other party hereto.

(14) It is mutually understood and agreed that the failure of the Company in any instance to exercise its option to cancel this agreement under the provisions of any of the paragraphs hereof, shall not be construed as a waiver of the rights of cancellation for any subsequent breach of the provisions of any of the paragraphs hereof by the Lessor.

(15) This agreement is to take immediate effect and supersedes all prior written or verbal agreements between the parties hereto covering the same subject matter. This agreement shall remain in full force and effect for a period of one (1) year from the date of the execution, unless sooner terminated by operation of law, or by mutual consent of the parties hereto, or by virtue of any other provision contained in this agreement. This agree- [fol. 283] ment shall automatically be renewed for further periods of a year upon any anniversary date unless cancelled in accordance with the provisions of this agreement, or terminated by operation of law.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and date first above written.

OKLAHOMA FURNITURE MANUFACTURING COMPANY,
a Delaware Corporation, "Company"

BY .....
Vice-President

.....
Lessor

.....

.....
Address

In the presence of: .....

.....

[fol. 284] EXHIBIT 3

EQUIPMENT LEASE AGREEMENT

Now on this ..... day of ....., 195....., it is agreed by and between the Oklahoma Furniture Manufacturing Company, a Delaware corporation, having its principal office in Guthrie, Oklahoma, hereinafter referred to as "Company", and ....., a resident of the City of ....., State of ..... hereinafter referred to as "Lessor", as follows:

(1) The Company is engaged in the transportation of its own property in intrastate and interstate commerce and desires to obtain by lease and to have operated in its business motor vehicle equipment owned by the Lessor.

(2) That the Lessor is the owner of certain motor vehicle equipment described in Schedule "A" attached hereto and made a part hereof, which equipment is available to be operated in the company business under this agreement.

(3) The Company hereby leases from the Lessor the motor vehicle equipment described in Schedule "A" hereto attached and made a part hereof, and such additional equipment as may hereafter be specifically endorsed on said schedule.

(4) It is agreed that as the sole rental and consideration for the use of said motor vehicle equipment the company agrees to pay the lessor rents as follows:

14¢ per mile for each mile traveled as hereinafter computed.

In addition thereto, on return loads of material which the company purchases from others in the operation of its business, the company will pay an additional 5¢ per mile on the back haul. Return mechandise shall be picked up by the lessor and returned to the company plant and shall not be considered as a return load for the purposes of this agreement.

(5) The mileage referred to in paragraph (4) above is to be computed upon the regular highway mileage upon reports turned in by the lessor weekly; such reports to be audited by the company at its office in Guthrie, Oklahoma, and subject to correction in favor of either party in the event it does not conform to the highway mileage.

(6) The motor vehicle equipment covered by this agreement shall be operated only by the lessor, or, in the event of his illness, disability, or in the event of the operation by the lessor of more than one piece of equipment at the same time, by a properly qualified driver who shall first obtain the written permission and approval of the company.

(7) It is agreed that the consideration set forth in paragraph (4) is the sole rental and consideration for the use of such motor vehicle equipment and the lessor shall pay all operating costs arising from the operation of said motor vehicle equipment, including the cost of gasoline, oil, grease, repairs, maintenance, antifreeze, and such other costs as may be involved in the operation and maintenance of said equipment. Lessor further agrees to pay cash for all expenses and to permit no charges to be made to himself or to the company.

[fol. 285] Lessor agrees to keep and maintain said motor vehicle equipment at all times while in operation under this lease agreement, in first class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies and in accordance with such safety rules and regulations as the company may promulgate and such rules and regulations as the insurance carriers handling any part of the risks on said motor vehicle equipment may require.

The term "first class operating condition" shall include, but not be limited to, the requirement that the lessor keep said equipment clean at all times and washed with sufficient frequency to compare favorably in appearance with company owned equipment.

All painting and lettering on leased equipment shall be done in accordance with the company's specifications and shall include a statement in the manner and form as may

be required by any statute, rule or regulation, that said equipment is owned and operated by the lessor under lease to the company. All such lettering shall be at the expense of the lessor.

The company shall have the right to reject the use of any equipment not in "first class operating condition" and such equipment shall not be used in the business of the company until it shall have been placed in such condition.

In the event of the failure of lessor to pay the operating cost on such equipment, or to place the same in first class operating condition, as soon as is reasonably possible after notice to company, the company may, at its sole option, cancel this agreement forthwith, or at its option pay the necessary operating costs and expenses and charge the same to lessor's account with the company.

(8) The company shall have the right to direct the use of the leased motor vehicle equipment for any and all lawful purposes in connection with its business and to designate the trips and routes on which such equipment shall be used. The lessor reserves the right to operate said equipment in the service of any other concern when not engaged in the business of the company, but it is agreed that at no time shall he haul any property belonging to any other person, concern or corporation during any part of any trip which is operated on the company's business.

(9) It is agreed that at no time shall any passenger be carried on said motor vehicle equipment or any persons other than the lessor, his employees, the employees of the company, or other persons expressly given written permission by the company.

(10) The lessor warrants that during the life of this agreement, he will not suffer nor allow said leased equipment to be in any way restricted by liens, encumbrance, mortgage, or held as security for any debt or obligation except with the express and written consent of the company.

(11) In consideration of the rental provided herein, it is agreed that the company shall not be liable to the lessor

for wear, tear and depreciation resulting from the use of said leased equipment, nor shall the company be liable for any damage caused to said leased equipment by accident, theft, fire or any other hazard or casualty, or by the acts of the lessor, or his employees, or by the acts of third parties or resulting from acts of God, or events beyond the control of the company.

[fol. 286] (12) The Company shall, at its sole expense, carry cargo insurance covering the property transported on said leased equipment during the entire perio. of this lease in such amounts as the Company in its own sole judgment may deem adequate, but in no event shall such coverage be in any amount less that that required by law, or by the rules and regulations of any regulatory body having jurisdiction over this subject matter. The Lessor shall, at his own sole expense, carry property damage and public liability insurance covering the operation of said leased motor vehicle equipment during the entire period of this lease in such amounts as the Company may deem adequate, but in no event shall such coverage be in an amount less than that required by law or by the rules and regulations of any regulatory body having jurisdiction over this subject matter. The Lessor shall pay social security tax, compensation insurance, fees for certificates or permits and fines or penalties for inadequate certificates or permits. The Lessor shall, also comply with the Workmen's Compensation laws with respect to all persons engaged in operations under this agreement to the extent required by any authority having jurisdiction over the matter. The Company shall not carry collision insurance or fire and theft insurance or any other type of insurance for the account of the Lessor, but if the Lessor carries such coverage, it shall be at the Lessor's own sole cost. The insurance coverage to be obtained by the Lessor shall be effective while said leased equipment is being operated in and about the business of the Company.

(13) The Lessor shall, at his own sole expense, procure Oklahoma Commercial License plates for use on said leased equipment. The Lessor will at his expense pay any and all public utility franchise and permit fees, or taxes

levied by any public utility regulatory body having jurisdiction over the operation of said leased equipment where such fees and taxes arise directly and exclusively from the operation of said leased equipment in transportation for the Company.

(14) If other motor vehicle equipment is furnished by the Company to the Lessor for use in connection with operation under this agreement, any such other equipment furnished to the Lessor by the Company shall remain at all times the property of the Company and shall be returned to the Company by the Lessor upon the termination of this agreement in substantially the same condition as when received by the Lessor, reasonable wear, tear and depreciation excluded.

Where the Lessor only furnishes a tractor and uses a Company trailer, it is further agreed that the lessor shall be liable to the extent of $250.00 for any damage other than reasonable wear and depreciation occurring to said trailer while in his custody or attached to his tractor.

The limits of liability expressed above shall not relieve the lessor from his liability for conversion, theft, or embezzlement of such Company trailer.

(15) The Lessor shall not be liable for loss or damage to company property transported on or by said leased equipment except for losses due to his gross negligence or larceny, embezzlement or conversion of said property.

(16) It is expressly understood and agreed that the Company shall retain from all rental compensation to be received by the Lessor five percent thereof, said amounts to be retained by the Company until the amount of $1,000.00 has been retained. The Company shall have the right to charge against said fund any expense which it is forced to pay for the account of the Lessor, or any other sums due the Company under this contract, and in the event said fund is depleted below $1,000.00, shall have the right to make further deduction of ten percent from rental compensation until such fund again reaches the sum of $1,000.00. Upon the termination of this agreement, said fund, less any proper charges by the Company, shall be paid to the Lessor.

[fol. 287] (17) It is mutually understood and agreed that the Company may cancel this agreement forthwith upon any material breach of the provisions of this agreement by the Lessor, or in the event that the Company is requested, or instructed by its insurance companies, or any regulatory body having jurisdiction over these operations to discontinue the use of the leased equipment. Either of the parties hereto shall have the right to cancel this agreement for any other cause, or reason whatsoever, upon the giving of a thirty (30) day written notice to the other party hereto.

(18) It is mutually understood and agreed that the failure of the Company in any instance to exercise its option to cancel this agreement under the provisions of any of the paragraphs hereof, shall not be construed as a waiver of the rights of cancellation for any subsequent breach of the provisions of any of the paragraphs hereof by the Lessor.

(19) This agreement is to take immediate effect and supersedes all prior written or verbal agreements between the parties hereto covering the same subject matter. This agreement shall remain in full force and effect for a period of one year from the date of the execution, unless sooner terminated by operation of law, or by mutual consent of the parties hereto, or by virtue of any other provisions contained in this agreement. This agreement shall automatically be renewed for further periods of a year upon any anniversary date, unless cancelled in accordance with the provisions of this agreement, or terminated by operation of law.

In Witness Hereof, the parties hereto have hereunto set their hands and seals this day and date first above written.

Oklahoma Furniture Manufacturing Company,
A Delaware corporation, "Company",

By .....
Vice-President

.....
Lessor

Address: .....

In the Presence of:

.....

.....

[fol. 288] EXHIBIT 4

EQUIPMENT LEASE AGREEMENT

Now on this 3 day of October, 1956, it is agreed by and between the Oklahoma Furniture Manufacturing Company, a Delaware Corporation, having its principal office in Guthrie, Oklahoma, hereinafter referred to as "Company", and Robert Custard a resident of the City of Guthrie, State of Oklahoma hereinafter referred to as "Lessor", as follows:

(1) The Company is engaged in the transportation of its own property in intrastate and interstate commerce and desires to obtain by lease and to have operated in its business motor vehicle equipment owned by the Lessor.

(2) That the Lessor is the owner of certain motor vehicle equipment described in Schedule A attached hereto and made a part hereof, which equipment is available to be operated in the company business under this agreement.

(3) The Company hereby leases from the Lessor the motor vehicle equipment described in Schedule A hereto attached and made a part hereof, and such additional equipment as may hereafter be specifically endorsed on said schedule.

(4) It is agreed that as the sole rental and consideration for the use of said motor vehicle equipment the company agrees to pay the Lessor rent as follows:

Fifteen (15) cents per mile for each mile traveled as hereinafter computed.

Where tandem trailer is furnished by the company to be pulled by the lessor's equipment, the rate shall be sixteen (16) cents per mile for each mile traveled as hereinafter computed.

In addition thereto, on return loads of material which the company purchases from others in the operation of its business, the Company will pay an additional four (4) cents per mile on the back haul. Return

merchandise shall be picked-up by the lessor and returned to the company plant and shall not be considered as a return load for the purpose of this agreement.

(5) The mileage referred to in Paragraph 4, above, is to be computed upon the regular highway mileage upon reports turned in by the lessor weekly; Such reports to be audited by the Company at its office in Guthrie, Oklahoma, and subject to correction in favor of either party in the event it does not conform to the highway mileage.

(6) The motor vehicle equipment covered by this agreement, shall be operated only by the lessor, or, in the event of his illness, disability, or in the event of the operation by the lessor of more than one piece of equipment at the same time, by a properly qualified driver who shall first obtain the written permission and approval of the company.

[fol. 289] (7) It is agreed that the consideration set forth in Paragraph 4 is the sole rental and consideration for the use of such motor vehicle equipment and the lessor shall pay all operating costs arising from the operation of said vehicle equipment, including the cost of gasoline, oil, grease, repairs, maintenance, anti-freeze, and such other costs as may be involved in the operation and maintenance of said equipment. Lessor further agrees to pay cash for all expenses and to permit no charges to be made to himself or to the Company.

Lessor agrees to keep and maintain said motor vehicle equipment at all times while in operation under this lease agreement in first class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies and in accordance with such safety rules and regulations as the Company may promulgate and such rules and regulations as the insurance carriers handling any part of the risks on said motor vehicle equipment may require.

The term "first class operating condition" shall include, but not be limited to, the requirement that the lessor keep said equipment clean at all times and washed with suffi-

cient frequency to compare favorably in appearance with Company owned equipment.

All painting and lettering on leased equipment shall be done in accordance with the Company's specifications and shall include a statement in the manner and form as may be required by any statute, rule or regulation, that said equipment is owned and operated by the lessor under lease to the Company. All such lettering shall be at the expense of the Lessor.

The Company shall have the right to reject the use of any equipment not in "first class operating condition" and such equipment shall not be used in the business of the Company until it shall have been placed in such condition.

In the event of the failure of Lessor to pay the operating cost on such equipment, or to place the same in first class operating condition, as soon as is reasonably possible after notice to Company, the Company may at its sole option cancel this agreement forthwith, or at its option pay the necessary operating costs and expense and charge the same to Lessor's account with the Company.

(8) The Company shall have the right to direct the use of the leased vehicle equipment for any and all lawful purposes in connection with its business and to designate the trips on which such equipment shall be used.

It is specifically agreed that the Lessor will not, during the term of this agreement, haul any property belonging to any other person, firm or corporation during any part of any trip operated on behalf of the company, nor shall the vehicle be leased or rented to any other person, firm, or corporation during the term of this agreement.

(9) It is agreed that at no time shall any passenger be carried on any motor vehicle equipment.

(10) The Lessor warrants that during the life of this agreement, he will not suffer nor allow said leased equipment to be in any way restricted by liens, encumbrance, mortgage, or held as security for any debt or obligation except with the express and written consent of the Company.

(11) In consideration of the rental provided herein, it is agreed that the Company shall not be liable to the Lessor for wear, tear and depreciation resulting from the use of said leased equipment, nor shall the Company be liable for any damage caused to said leased equipment by accident, theft, fire or any other hazard or casualty, or by the acts of the Lessor, or his employees, or by the acts of third parties, or resulting from acts of God, or events beyond the control of the Company.

[fol. 290] (12) The Company, in its discretion and at its expense, may carry insurance covering its property transported on said leased equipment during the period of this lease.

The Company will have the name of the Lessor endorsed as an additional assured upon its policies of property damage and public liability insurance covering the operation of motor vehicles and the additional premium incurred thereby shall be paid by the Lessor. The Company shall not carry collision, fire, theft, or any other type of insurance for the account of the Lessor and if the Lessor carries such insurance, it shall be at his sole cost.

The Lessor shall comply with the Workmen's Compensation Law with respect to any persons employed by him under this agreement to the extent required by any authority having jurisdiction over the matter and shall pay social security tax for any employee or for himself as a self-employed person, and premium for compensation insurance.

(13) The Lessor shall at his own sole expense procure Oklahoma commercial license plates to be used on said leased equipment. Lessor, for himself and for any agents, servants, and employees, agrees to obey all municipal, county, state and federal laws governing the use, operation, maintenance, safety regulations license, tax, permit, certificate, chauffeur and driver, reckless driving, speed and such other laws as may come within the purview of this lease, and when violations are committed by the Lessor, his agents, servants, or employees, the Company may at its option, charge the same against the sum re-

tained under Paragraph 16 until, in the judgment of the Company, it is absolved of any and all blame and reimbursed for any expense by reason or because of such violation.

(14) If a trailer or any incidental equipment is furnished by the Company to the Lessor for use in connection with operation under this agreement, any such trailer or incidental equipment furnished to the Lessor by the Company shall remain at all times the property of the Company and shall be returned to the Company by the Lessor upon the termination of the trip for which the same is furnished in substantially the same condition as when received by the Lessor, reasonable wear and tear and depreciation excluded.

Where the Lessor is furnished a company trailer, it is further agreed that the Lessor shall be liable to the extent of Two Hundred Fifty Dollars ($250.000) for any damage other than reasonable wear and tear and depreciation occurring to said trailer while in his custody or attached to his tractor.

The limits of liability expressed above shall not relieve the Lessor from his liability for conversion, theft, or embezzlement of such company trailer or any incidental equipment which may be furnished by the Company.

(15) The Lessor shall not be liable for loss or damage to Company property transported on or by said leased equipment except for losses due to his gross negligence or larceny, embezzlement, or conversion of said property.

(16) It is expressly understood and agreed that the Company shall retain from all rental compensation to be received by the Lessor five percent thereof, said amounts to be retained by the Company until the amount of $1,000.00 has been retained. The Company shall have the right to charge against said fund any expense which it is forced to pay for the account of the Lessor, or any expense which it is forced to pay for the account of the lessor, or any other sums due the company under this contract, and in the event said fund is depleted below $1,000.00, shall have the right to make further deduction of five percent from rental compensation until such fund

again reaches the sum of $1,000.00. Upon the termination of this agreement, said fund, less any proper charges by the company, shall be paid to the lessor.

[fol. 291] (17) It is mutually understood and agreed that the Company may cancel this agreement forthwith upon any material breach of the provisions of this agreement by the Lessor, or in the event that the Company is requested, or instructed by its insurance companies, or any regulatory body having jurisdiction over these operations to discontinue the use of the leased equipment. Either of the parties hereto shall have the right to cancel this agreement for any other cause or reason wahtsoever upon the giving of a thirty (30) day written notice to the other party hereto.

(18) It is mutually understood and agreed that the failure of the Company in any instance to exercise its option to cancel this agreement under the provisions of any of the paragraphs hereof, shall not be construed as a waiver of the rights of cancellation for any subsequent breach of the provisions of any of the paragraphs hereof by the Lessor.

(19) This agreement is to take immediate effect and supersedes all prior written or verbal agreements between the parties hereto covering the same subject matter. This agreement shall remain in full force and effect for a period of one year from the date of the execution, unless sooner terminated by operation of law, or by mutual consent of the parties hereto, or by virtue of any other provision contained in this agreement. This agreement shall automatically be renewed for further periods of a year upon any anniversary date unless cancelled in accordance with the provisions of this agreement, or terminated by operation of law.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and date first above written.

OKLAHOMA FURNITURE MANUFACTURING COMPANY,
A Delaware Corporation, "company"

By .....
Vice-President

/s/ Robert Custard
Lessor

Route 2 Guthrie
Guthrie Okla
Address

In the presence of: /s/ Lavana Toon
/s/ Barney Kennedy

[fol. 292] EXHIBIT 5

AGREEMENT

THIS AGREEMENT entered into this 14th day of December, 1956 by and between OKLAHOMA FURNITURE MANUFACTURING COMPANY of Guthrie, Oklahoma, hereinafter called the "Company" or "Employer" and the United Furniture Workers of America, A. F. L. - C. I. O., acting for itself and in conjunction with the Local Union No. 272, United Furniture Workers of America, A. F. L. - C. I. O., hereinafter called the "Union".

WITNESSETH:

WHEREAS, the parties desire to enter into an agreement relating to wages, hours and other conditions of employment which will provide methods for harmonious relationship between the Company and its employees and accomplish fair and peaceful adjustment of all disputes which may arise without interruption of the Company's business,

THEREFORE, it is mutually agreed as follows:

ARTICLE I

RRCOGNITION

SECTION 1. The Company recognizes the Union as the sole and exclusive representative for the purpose of collective bargaining, in respect to rates of pay, wages, hours of work and other conditions of employment for its production, maintenance and truck-driving employees, excluding executives, clerical employees and supervisory employees as defined by NLRB in Case #16-RC1045.

ARTICLE II

VOLUNTARY CHECK-OFF

SECTION 1. The Company agrees to deduct (upon receipt of written authorization by employees for such deductions) the regular monthly dues of members in the amount authorized by the Union in accordance with its by-

laws. Such deductions shall be made on the first pay day of each month and shall be remitted to the Financial Secretary of the Union not later than the fifteenth (15th) day of the current month.

[fol. 293] SECTION 2. Any employee may cancel the dues deduction authorization by giving the Company ninety (90) days' notice in writing of a desire to cancel.

ARTICLE III

GRIEVANCE PROCEDURE

SECTION 1. Any employee covered by this Contract, having a grievance in connection with his work, may present his grievance in company with his Stop Steward to the foreman of his department and they shall endeavor to make a satisfactory settlement thereof.

All grievances or disputes must be presented in writing by the employee within five (5) days after its occurrence to the Shop Foreman of his department. Every effort will be made by the foreman to amicably and satisfactorily adjust the grievance or dispute.

If a settlement cannot be reached, the grievance may be determined by the following procedure:

A. Between the aggrieved member of the Union and/or the Shop Steward and the foreman of the department involved.

B. Between the Shop Committee and the General Superintendent or Company representative.

C. A representative of the United Furniture Workers of America, CIO, may enter the matter at any step of the procedure upon request of either party.

If any alleged grievance or dispute cannot be adjusted and satisfactorily disposed of as hereinbefore set out, either party shall have the right to submit it to arbitration, provided it is submitted within ten (10) days after final answer under Step B of this procedure.

For arbitration of any alleged grievance or dispute, the Company may appoint a representative and the Union

may appoint a representative and these two shall select a third. If the representative of the Company and the representatives of the Union cannot agree upon a third [fol. 294] arbitrator within five (5) days, the parties agree that the third party shall be one of the Federal Judges of this District or a party named or appointed by him, upon application of either of the parties. If arbitration is necessary a second time during the term of this agreement, the U. S. Department of Labor shall furnish the arbitrator and such an alternating method shall be used thereafter in the selection of arbitrators. A decision agreed to by the majority of the arbitrators shall be binding on all parties.

SECTION 2. The cost of such arbitration shall be borne equally by the parties except the attorney fees which shall be paid for by the respective parties.

SECTION 3. The Company agrees that there will be no discrimination against any employee because of membership in the Union. The Union agrees it will not engage in union activities on Company time.

ARTICLE IV

MANAGEMENT

SECTION 1. Management of the Company's Plant and the direction of its working force, including the right to hire and relieve from active duty because of lack of work or other legitimate reasons and the right to suspend, discipline or discharge, shall be vested exclusively in the Company, subject to provisions of this Agreement.

ARTICLE V

STEWARDS AND SHOP COMMITTEES

SECTION 1. The Company agrees to recognize the Stewards in the various departments which the Union elects for the purpose of settling grievances within the departments. The Company further agrees to recognize the Shop Committee for the settling of grievances not settled by the Stewards.

[fol. 295] SECTION 2. The Union agrees to furnish the Company in writing the names of the Shop Committee, Stewards and Union officers and to promptly inform the Company of any changes.

SECTION 3. The International Representatives of the Union shall have access to the Shop of the Company at all times during working hours upon receipt of express permission of the Management, and shall enter same by way of the office.

ARTICLE VI

SENIORITY

SECTION 1. Seniority shall be based on the length of services from last date of hiring and shall be determined on a departmental basis.

SECTION 2. A permanent seniority list of all employees, including those sick, on leave, in the Military Service and laid off, shall be maintained by the Company and shall be posted in each department each six (6) months. Two (2) duplicate copies of the seniority list shall be furnished the Union.

SECTION 3. An employee who has acquired seniority may accumulate seniority during absence due to illness or injury but not to exceed one year. Such employee will be reinstated in his old job or similar work upon recovery, provided the employee is capable of performing such work and work is available.

SECTION 4. Any dispute or grievance as to seniority may be taken up under the grievance and arbitration procedure of this agreement.

ARTICLE VII

LAY OFFS AND REDUCTION OF WORK WEEK

SECTION 1. In the event of a required reduction in the working force due to slackening or curtailment of production, or in order to maintain a standard forty (40) hour work week, then such layoffs shall be made in

accordance with seniority, that is, the last employee hired shall be laid off first.

[fol. 296] SECTION 2. Employees to be laid off under this Article shall be given preference to employment on seniority basis in other departments of classifications; provided, however, that the senior employee is able to perform the duties required.

SECTION 3. Any employee reporting for work at his usual or regular time shall receive not less than six (6) hours work or pay unless such employees are notified not to report to work by notice sent to the address appearing on the Company's records or by notice posted on the bulletin boards prior to the shift on previous day. This shall not apply in the event of any emergency beyond the control of the Employer, such as wind storm, fire, power shortage or such causes, or where the employee is not working on the date notice is posted.

ARTICLE VIII

RECALL AND REHIRING

SECTION 1. When recall (rehiring) after a layoff takes place, the oldest employee in point of seniority, capable of performing the job, shall be called in first.

SECTION 2. Employees being recalled to work after a layoff shall be notified by the Company to report to work, by registered mail sent to the employee's last known address. Failure to report as required by the Company shall terminate all rights and obligations of the Company under this Agreement.

Section 3. The Company shall not hire new employees for any department when there are any employees on Company layoff from another department if the laid off employees are qualified for the job or jobs in question and are willing to work in the other department.

Article IX

DISCHARGE OF EMPLOYEES

Section 1. There shall be a trial period of thirty (30) days for all new employees, during which time the Employer may judge the competency of the worker to perform his duties.

[fol. 297] Section 2. During the trial period of an employee, the Employer shall have the absolute right to discharge such employee. Employees on such trial periods shall be deemed temporary employees.

Section 3. After the expiration of any trial period as herein provided, and subject to the grievance procedure provided in Article III hereof, the Employer shall have the right to discharge employees only for cause, and upon request by the employee shall give a written notice containing the reasons for the discharge. Any violation by an employee of reasonable shop rules shall be deemed cause for discharge.

Article X

PROMOTIONS AND TRANSFERS

Section 1. Promotions and transfers to all vacancies and new positions created during the term of the Agreement will be made on the basis of seniority, the oldest employee in point of service will be given promotion, unless such employee is deemed incapable of filling the job. Failing to qualify, the employees will retain all their seniority in their former positions.

Section 2. In the event an employee with less seniority is outstandng in ability over those employees with greater seniority, such employee may be promoted out of line seniority by mutual agreement between the Company and the Union.

Section 3. If an employee is promoted or transferred to a supervisory position or other job outside the coverage of this Agreement, such employee, in the event that he

shall be returned to his former job or similar job, shall retain his original seniority plus the accumulated time spent in the supervisory or other capacity.

SECTION 4. Employees wishing to transfer to another job, department or shift shall apply for such transfer [fol. 298] to the Company. The employee will then be placed on a list in the order of plant seniority and will be transferred to vacancies as they arise in accordance with plant seniority standing, subject to his ability to perform the work.

SECTION 5. In the event that an employee is transferred or promoted to another job in the skilled classification, he shall receive not less than the regular rate of pay for the job to which he is transferred.

ARTICLE XI

HOURS OF WORK

SECTION 1. The regular work day shall consist of eight (8) consecutive hours a day, exclusive of the lunch period. The regular work week shall consist of forty (40) hours comprising five (5) consecutive days, Monday through Friday, inclusive.

SECTION 2. All work performed in excess of eight (8) hours in any day, in excess of forty (40) hours in any calendar week, work performed outside of the regular shift shall be paid for at one and one half (1½) times the straight time rate. Saturday work shall be paid for at one and one half (1½) times the straight time rate excepting night shift workers for the shift extending into Saturday morning and maintenance personnel who have worked less than forty (40) hours in the calendar week.

SECTION 3. The regular holidays are New Year's Day, 89'ers Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day and Christmas. Employees will be excused without pay on regular holidays. A holiday which falls on Sunday shall be observed on Monday.

SECTION 4. Double time shall be paid for all work performed on Sundays and the regular holidays.

[fol. 299] ARTICLE XII

VACATION AND BONUS

SECTION 1. All employees who have worked for the Employer for one (1) year but less than five (5) years by the end of the vacation period during any year that this agreement is in effect shall receive one (1) week's vacation with pay.

SECTION 2. All employees who have worked for the Company for five (5) years shall be entitled to and receive two (2) weeks' vacation with pay.

SECTION 3. All employees with ten (10) years of service or longer shall be entitled to and receive three (3) weeks' vacation with pay.

SECTION 4. The full amount of vacation pay to which the employee is entitled shall be paid to the employee on the last regular pay day preceding the vacation period. Vacations shall be taken by the employees entitled thereto between May 1st and September 30th at such time as may meet with the approval of the Employer. Every effort shall be made to meet the desires of the employees, but it is recognized that vacations must conform to the requirements of production and operations.

SECTION 5. The Employer may, if it is so desired, temporarily close down the plant or any department thereof in order to carry out this obligation to grant vacations, insofar as possible and consistent with the efficient management of the plant.

SECTION 6. Christmas bonuses shall be paid to employees as follows:

Employees with less than six months service	None
Employees with more than six months, but less than one year of service	$ 5.00
Employees with more than one year but less than two years of service	10.00
Employees with more than two years but less than five years of service	20.00
Employees with more than five years of service	25.00

[fol. 300] SECTION 7. The period of time for which an employee has worked for the employer shall be computed from December 15th of each year and the bonus be paid only to employees who continue their employment to at least one week before Christmas of such year.

SECTION 8. No employee shall be entitled to vacation pay or bonus as provided in this article unless the employee shall have worked at least 1900 hours during the period from December 15th to December 14th in each year during which this Contract is in effect for bonus purposes and May 16th to May 15th for vacation purposes, and in which the employee would otherwise qualify for a vacation or bonus. The holidays listed herein shall be counted as worked in computing the number of hours for vacation or bonus purposes.

ARTICLE XIII

LEAVES OF ABSENCE

SECTION 1. Leave of absence granted for the purpose of accepting full-time employment with the Union shall be granted for the duration of such employment, but in no event to exceed two (2) years.

SECTION 2. Union officers, stewards and committeemen shall be granted temporary leave of absence to conduct Union business, attend Union conferences, conventions, etc., subject to the needs of the business.

SECTION 3. Sick leave may be granted to any worker unable to work because of injury or illness for the full period of such illness or disability not to exceed one (1) year.

SECTION 4. Maternity leaves may be granted to women employees for not more than one (1) year and they shall be reinstated if work is available to their former or similar jobs upon written certification from the attending physician certifying physical ability to perform work required.

[fol. 301] SECTION 5. Reasonable leave may be allowed for personal reasons upon written request of a worker and with the approval of the Company.

ARTICLE XIV

LIFE INSURANCE

SECTION 1. The Company agrees to pay the sum of $500.00 to the beneficiaries named by a regular employee in the event of his death while in the regular employ of the Company, except under the following conditions:

A. When a regular employee is on written leave of absence from the Company which has been in effect more than thirty (30) days.

B. When a regular employee of the Company terminates his employment.

C. When a regular employee of the Company is discharged or laid off.

D. When a regular employee is absent from assigned work without written leave of absence from the Company for more than five (5) days.

E. When a regular employee is absent from assigned work for more than three (3) days without permission of the Company.

F. When the cause of death is compensable under the Oklahoma Workmen's Compensation Law.

G. When a regular employee has less than one (1) year of continuous service with the Company.

SECTION 2. Part-time, temporary or other employees are not classified on the Company payrolls as regular employees subject to this Agreement and shall be excluded from the provisions of this Article.

SECTION 3. Failure of a regular employee to provide the Company with a written designation of beneficiaries, their names and addresses, prior to his death shall cancel any obligation of the Company to make payments under this Article. In the event the Company is unable to locate the named beneficiaries competent to accept the amounts due within one (1) year next following the death of the regular employee, the obligation of the Company to make such payments shall be cancelled.

[fol. 302] ARTICLE XV

SECTION 1. Any employee who is drafted into or who volunteers for military service in the Armed Forces of the United States shall continue to acquire seniority during the period of such service and shall be restored to his or her prior employment or to a position substantially similar, at a rate of pay of no less than that received at the time of induction, with no loss of seniority or other rights. Such employees shall, upon return of employment, be entitled to vacations on the same basis as if they had continuously been employed and receive all wage increases and other benefits granted during the time of their service. If no longer able to perform the work the Company will endeavor to provide some other work suitable to the employee's ability.

SECTION 2. Any regular employee accepted into the Armed Services of the United States, either as a result of enlistment or induction, pursuant to the Selective Service Act, shall be paid a military bonus equal to forty (40) hours' pay at his contract rate in addition to any vacation pay for which he has qualified.

ARTICLE XVI

GENERAL

SECTION 1. The Company shall make reasonable provisions for the safety and health of employees during the hours of employment, and will provide devices and other equipment necessary to protect the employees from injury and sickness.

SECTION 2. The employer and employees will cooperate to maintain a sanitary condition throughout the plant.

SECTION 3. Bulletin board space in each department will be provided by the Company for the Union's use. Any notice to be posted on these boards by the Union, other than notices of Union meeting and elections, shall be approved by the Company before posting.

[fol. 303] SECTION 4. Foremen and Supervisors shall act in a supervisory capacity only and they shall not perform any work or operation regularly performed by workmen or operators except for the purpose of instruction or in an emergency.

SECTION 5. The Union agrees that its members employed by the Company will work for the Company upon the terms and conditions herein set forth and agrees to discipline any member who violates this Agreement.

SECTION 6. There shall be no discrimination against any employee in regard to tenure of employment, promotions, transfer, rates of pay or other conditions of employment because of race, creed, sex, Union membership, religious or political beliefs. Wherever the masculine gender is used in this agreement, it shall be deemed to refer to both male and female employees.

ARTICLE XVII

NO STRIKE

SECTION 1. For the duration of this Agreement and so long as its provisions are conformed to, the Company shall not engage in any lockout nor shall the Union or its members engage in or authorize any strike.

SECTION 2. For the purpose of this Agreement, an authorized strike is one which has been approved by a majority vote of the members of the local union who are directly affected by the proposed action and which thereafter has been approved by the International President.

[fol. 304] ARTICLE XVIII

WAGES

SECTION 1. The following minimum rates of pay shall be paid to hourly-rated employees of the Company within the bargaining unit:

COMMON LABOR (PLANT-WIDE)

	Start	After 1 Yr.	After 2 Yr.	After 3 Yr.
WOMEN	$1.00	$1.02½	$1.05	
MEN	$1.00	$1.02½	$1.05	$1.07½

SKILLED LABOR (PLANT-WISE)

	Minimum	Maximum
A	$1.10	$1.30
B	$1.35	$1.75

SECTION 2. It is agreed that any employee now on the payroll who was on the payroll prior to the time the minimum wage of $1.00 went into effect and who has not received from any source as much as 5¢ per hour shall be raised sufficient to equal 5¢ per hour.

SECTION 3. When an employee is placed in the skilled classification, he will receive the minimum rate, and upon progress satisfactory to the Company, will receive an annual increase of .05 cents per hour until the maximum rate is reached.

PIECE-WORKERS

Piece-work rates currently in effect in the Upholstery and Spring Departments will not be reduced during the life of this Agreement; however, the Company may at its own discretion increase piece-work rates at any time and in such amounts as it may deem appropriate. Any increase in piece-work rates shall be subject to the approval of the Union; this approval shall not be required on any new members put into the line and shall only apply where the rates are increased.

[fol. 305]

TRUCK DRIVERS

(Excluding owner-drivers working under independent contracts)

All Over-the-road truck drivers—$50.00 per week, plus .02 per mile. Other truck drivers—those driving around the plant, in the city of Guthrie and in the city of Oklahoma City, will receive the same rate of pay as they are now drawing.

SECTION 4. It is agreed between the parties that in the event of the cost-of-living index of the Bureau of Labor Statistics of the U.S. Department of Labor shall change as much or more than one (1) percent from the index published December 15, 1956 during the life of this Agreement, the wage rates established by the terms of this Agreement shall be adjusted up or down by applying a straight increase or decrease to the nearest one-half (½) percent to the weighted average of the straight-time rates paid in the bargaining unit as of the date of publication of the Index requiring the change in rates and payable and effective with the beginning of the first payroll period following such publication. The resulting increase or decrease in cents per hour shall be rounded to the nearest one-half cent (½¢) and applied to all wage rates in the bargaining unit in the same amount.

The Company will examine the Indexes (each six (6) months) during the life of this Agreement and make the appropriate adjustments as provided above; however, no adjustment indicated by the Index requiring a reduction of the rates set out in Section 1 of this Article shall be applied and the minimum rates established in Section 1 shall remain the effective minimum for the life of this Agreement.

[fol. 306] ARTICLE XIX

DURATION AND REMOVAL

SECTION 1. This Agreement shall remain in full force and effect from December 14, 1956 to December 14, 1958 and from year to year thereafter unless sixty (60) days prior to the expiration date or any anniversary thereof notice in writing by registered mail shall be given by either party to the other of desired changes in or termination of the Agreement.

UNITED FURNITURE WORKERS
OF AMERICA, CIO, Local

/s/ Signatures illegible

OKLAHOMA FURNITURE
MANUFACTURING COMPANY

[fol. 307] *AGREEMENT*

It is agreed by and between Oklahoma Furniture Manufacturing Company of Guthrie, Oklahoma, hereinafter called the "Company" or "Employer", and the United Furniture Workers of America, A.F.L. - C.I.O., acting for itself and in conjunction with the Local Union No. 272, United Furniture Workers of America, A.F.L.-C.I.O., hereinafter called the "Union".

1. The parties have an agreement entered into on the 14th day of December, 1956, hereinafter called "Original Contract". The Agreement of present date is supplemental to Original Contract and does not alter in any way the terms of Original Contract, except as hereinafter provided.

2. Company has heretofore had certain truck drivers operating under separate contracts, which contracts are to be abrogated and a new classification of truck driver employees is hereby created known as "truck drivers and maintenance men", and this Agreement involves only such employees.

3. Article VI of the Original Contract is amended as to these employees only. Seniority of these employees shall date from their first employment with Company as a truck driver or the first contract which they had with the Company, whichever is the earliest in date.

4. Subsection 3 of Article VII shall not apply to these employees.

5. Article XI of the Original Contract shall not apply to these employees.

6. In lieu of the 1,900 hours required of other employees in Section 8 of Article XII, it is agreed that as to these employees the measure shall be 75,000 miles driven during the same periods as provided in Section 8. Vacation pay shall be computed upon the rate of pay for driving and the average weekly mileage in the year next preceding the vacation.

[fol. 308] 7. Article XVIII is amended as to these employees as follows: These employees being over-the-road

drivers, driving trucks long distances from the plant, shall be required to maintain the truck in good running condition at all times, and to pay their own living expenses while on the road. The rate of pay shall be as follows: For driving, 4½ cents per mile; For living expenses while on the road, ¼ cent per mile; For labor in maintenance of the truck, ¼ cent per mile. On Back Hauls of Material: For driving, 5½ cents per mile; For Living Expenses while on the road, ¼ cent per mile; For Labor in maintenance of the truck, ¼ cent per mile.

8. Article XVIII of the Original Contract shall not apply as to employees covered under this Agreement.

9. Unless specifically amended herein, all the other provisions of the Original Contract of the 14th of December, 1956, are made a part hereof by reference, and are applicable to these employees.

Dated this 15th day of July, 1957.

UNITED FURNITURE WORKERS OF AMERICA, C.I.O. Local "Union"

/s/ Signatures illegible

OKLAHOMA FURNITURE MANUFACTURING COMPANY OF GUTHRIE, OKLAHOMA, "Company" or "Employer"

[fols. 309-339] • • • •

[fol. 340] BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. MC-C-2143

OKLAHOMA FURNITURE MANUFACTURING CO., ET AL.—
INVESTIGATION OF OPERATIONS

1. Furnishing of truck-tractors and drivers by certain respondent owner-operators to respondent Oklahoma Furniture Manufacturing Company found under the circumstances disclosed, to constitute operation by the owner operators as contract carriers by motor vehicle in violation of the provisions of the Interstate Commerce Act. Cease and desist order entered.

2. Proceeding discontinued as to all other respondents. *Walter D. Hanson* for respondents.

Ellis V. Gregory, Lloyd R. Reeder, and *William W. Guild* for Bureau of Inquiry & Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION—Decided April 22, 1959

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by respondents jointly, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied.

By order entered August 28, 1957, division 1 instituted an investigation under section 204(c) of the Interstate Commerce Act into and concerning the motor carriers operations and practices of respondents, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Robert A. Custard,[1] Charles W. McGee, Todd Shinn,

[1] Subsequent to the entry of this order and prior to the hearing, Robert Custard terminated his vehicle lease contract with respondent Oklahoma Furniture Manufacturing Company, and the latter entered into a similar equipment leasing arrangement with Charles McGee, of Guthrie, Okla. By stipulation between the parties it was agreed that McGee be substituted in place of Custard as a respondent in this proceeding.

[fol. 341] and William M. Martin, hereinafter collectively referred to as the owner-operators, to determine whether they have been or are engaging in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle in violation of any of the provisions of part II of the Interstate Commerce Act, or of any requirements established pursuant thereto and whether respondent, the Oklahoma Furniture Manufacturing Company, hereafter referred to as the Company, has, in concert with the aforementioned parties, participated in said violations; to determine what orders should be entered to remove any unlawfulness found to exist; and for the purpose of taking such other and further action as the facts and circumstances may appear to warrant.

The order of investigation recited that there is reason to believe that the respondents have been or are engaging or participating in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle subject to the provisions of part II of the act between Guthrie, Okla., and points throughout the United States, without there being in force a certificate of public convenience and necessity or a permit issued by the Commission authorizing any of the aforementioned parties to engage in operations as a common or contract carrier.

The Company, at Guthrie, manufactures furniture which is shipped, in company-owned trailers pulled by either company-owned or leased motor equipment, to dealers located at points throughout the United States. The same equipment is usually utilized on return trips to Guthrie to carry raw materials which are used by the Company [fol. 342] in the manufacture of its products. The Company owns six tractors which are operated by salaried drivers and 17 trailers which are pulled by its own tractors or those individually owned by and leased from owner-operator respondents. Prior to 1952 the transportation was performed wholly in company-owned units driver by salaried employees. In 1951 the Company discovered upon investigation that it was being defrauded by most of its drivers through the improper use of the

credit cards which had been issued to them. The delinquent drivers were discharged and the Company began to use leased owner-operators' tractors. In 1955 after one owner-operator was arrested in Arkansas for operating without appropriate authority, a suit was filed in the civil courts of that State for a declaratory judgment as to whether the owner of the tractor was required to obtain a permit from the Arkansas Public Service Commission. In *Robinson* v. *Woodard*, 227 Ark. 102, 296 S. W. 2d. 672, decided December 10, 1956, the Supreme Court of Arkansas held that the arrested owner-operator was performing service, not as an employee of the Company, but as a motor contract carrier operating unlawfully in Arkansas. The fact that the owner-operator was required to pay the costs of operation was found to be incompatible with private carriage under a section of the Arkansas statutes which reads:

> Any person, who by lease or otherwise, permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission (Arkansas Public Service Commission), and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exericses any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier.[2]

[fol. 343] Review of the decision of the Arkansas Supreme Court by the United States Supreme Court was sought but certiorari was denied. Subsequent thereto, in or about July 1957, the Company cancelled all prior agreements and entered into new equipment leasing arrangements specifically drawn and designed to insure that its use of leased tractors driven by the owners would be *bona fide* private carriage within the meaning of applica-

[2] The term "motor carrier" under the applicable Arkansas statute includes both a common carrier by motor vehicle and a contract carrier by motor vehicle and any person performing for-hire transportation service without authority from the Arkansas Public Service Commission.

ble State and Federal law. It is these arrangements and the transportation provided thereunder with which we are here concerned. The written leases entered into between the Company and each of the owner-operators uniformly provide in substance that (1) during the term of the lease, the Company shall pay the owner-operator 10 or 11 cents a mile, depending upon whether a single-axle or tandem-axle trailer is utilized, for each mile the unit is operated, plus an additional 3 cents a mile on back hauls of the Company's raw materials which usually are heavier than outbound cargoes, (2) payments under the agreement shall be made weekly, (3) the motor vehicles covered shall be operated by an "employee" of the Company who shall be properly qualified and physically fit in accordance with State and Federal regulations, (4) the owner-operator shall pay all operating costs including the cost of gasoline, oil, grease, and parts, and at his own expense shall procure the Oklahoma commercial license plates to be used on the said equipment, (5) the Company shall keep and maintain said equipment, at all times while in operation under this lease, in first-class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies, (6) in the event of [fol. 344] the owner-operator's failure to pay the operating costs, the Company may, at its own option, cancel the agreement forthwith or pay the necessary operating costs and expenses and charge the same to the owner-operator's account with the Company, (7) the Company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the Company, and the Company will not sublease the equipment of any other person, firm, or corporation, (8) the Company shall retain from all rental compensation due to the owner-operator 5 percent thereof, until the amount of $1,000 has accumulated, (9) this sum shall be refundable to the owner-operator, less any expense which the Company is forced to pay for the account of the owner-operator, or any other sums due the Company under the contract, (10) the Company shall not be liable for any damage caused to the leased equipment by accident, theft, fire, or any other hazard or casualty,

(11) the Company will have the owner-operator's name endorsed with its own as an additional assured upon property damage and public liability insurance policies covering the operation of motor vehicles, but shall not be required to carry collision, fire, theft, or any other type of insurance for the owner-operator's account; and, if the owner-operator himself carries such insurance, it shall be his sole cost, but the owner-operator shall not be responsible for any loss to Company equipment, property, or cargo, (12) either party may cancel the lease upon the giving of 30 days' written notice to the other party, and (13) the agreement shall remain in full force and effect for a period of 1 year from the date of the execution, unless ordered terminated by operation of law, by the mutual consent of the parties, or by virtue of any other provision of the contract.

[fol. 345] The Company pays the social security taxes upon, and withholds income taxes from, the wages of the owner-operators, as well as providing Workmen's Compensation benefits. It carries public liability and property damage insurance on the leased units and cargo insurance on the lading transported by such units. The owner-operators are shown as assureds or beneficiaries in the liability insurance policy carried by the Company. This liability insurance is in force at all times on the leased tractors, whether they are pulling Company trailers or are being used by the owner-operators as a method of transport between the Company's place of business and their homes. The Company maintains on file physician's certificates, drivers' logs, and vehicle inspection reports.

The Company has entered into a contract with the United Furniture Workers of America, A.F.L. - C.I.O., as employer of certain of the owner-operators. Although not all of the latter are members of the union, arrangements specified in the contract are applicable to the Company's nonunion employees. Among other things, the union contract provides that the Company may discharge any employee for cause; that the owner-operators shall maintain their trucks in good running condition *at all*

times[3] and pay their own living expenses while on the road; and that they shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cent a mile for living expenses, and 0.25 cent a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, increasing to 6 cents a mile on a return movement of raw materials. The con- [fol. 346] tract with the union covering owner-operators further stipulates that any owner-operator who has driven at least 75,000 miles during a year in which the contract is in effect shall be entitled to vacation pay, (for 1 or 2 weeks depending upon his length of service with the Company) computed upon the rate of pay for driving and the average weekly mileage in the preceding year. The union contract exempts owner-operators from those provisions which guarantee employees 6 hours work or pay if they report for work at their usual or regular time and drivers of company-owned tractors a specified minimum weekly salary. The drivers of company-owned tractors, also under contract, receive a basic salary of $50 a week plus 2 cents a mile for driving.

Each owner-operator receives two weekly pay checks, one covering the rental for the use of his tractor, and the other for his service as a driver. If for some reason the owner-operator is unable to drive his own tractor, it may be assigned to another driver, with the lessor continuing to receive compensation for the use of his tractor. In the event that an owner-operator exchanges tractors with another driver, his compensation would be based upon the mileage driven by him at the driving rate plus the mileage his tractor is operated by the other driver at the rental rate. Ordinarily the Company uses the owner-operator on his own equipment. An instance to the contrary would be a situation arising when an owner-operator's equipment is disabled at a time that a driver of a company-owned (or leased) tractor is ill. The owner-operators pay for maintenance and repairs on their own equipment and use their tractors exclusively in the service of the Company.

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[3] This contract provision is inconsistent with provision (5) set forth above in reference to the leasing agreement between the Company and each owner-operator.

[fol. 347] The service of each owner-operator is not used everyday. If the company does not call him, he calls in to find out if he is to be loaded out. On days that his services are to be utilized he arrives at the Company with his tractor and checks the bulletin board to find out whether he is supposed to go out on a trip. When there is a trip arranged he connects his tractor with a tandem or single-axle trailer of the Company which is loaded by yard employees of the Company. The owner-operators are instructed as to the shortest routes, from the origin to the first delivery point and between the various points of delivery, upon which compensation is based and "which naturally they follow". Prior to departure the owner-operator is handed a truck bill manifest, which differs from a conventional bill of lading in that the owner-operators are not required to sign a receipt for the Company freight they transport. The owner-operator pays all of the expenses of operation. After reaching his ultimate destination, the owner-operator picks up a load of inbound materials and returns it to the Company plant. At the plant he files a repair report, unhooks the trailer and goes home. The owner-operators garage their tractors at their homes.

The Company's customers are not billed directly for transportation costs. Instead the Company has divided the United States into zones and sells its furniture at a delivered price which varies according to the zonal location of the customer. Generally speaking, the more distant the zone from Guthrie the higher the delivered price; but in some instances, as where a lower price is required to meet competition or in a zone where the Company purchases raw materials, or as between two points in the same zone, the converse is true.

[fol. 348] There is no question but that the Company's primary business is furniture manufacturing and that the transportation service performed in the company-owned units is incidental to its primary business.[4] Its utilization of company-owned tractor-trailer units driven by regular

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[4] See section 203(c) of the Interstate Commerce Act, as amended in August, 1958.

salaried drivers for transpotration purposes is clearly private carriage. The substantial or primary issue here is as to whether those operations utilizing leased equipment of the owner-operators with their services as drivers are private carriage performed by the Company or for-hire carriage performed by the owner-operators.

The examiner concluded that the operation of the leased tractors, although ostensibly controlled by the Company, is actually controlled by the owner-operators; and that respondents have engaged in the transportation of property in interstate commerce for compensation without authority and in violation of the act; and he recommended that a cease and desist order be entered.

Respondents contend on exceptions (1) that the described transportation is not subject to our licensing jurisdiction inasmuch as the Company is purportedly a private carrier and the owner-operator purportedly its employee, (2) that the examiner's report contains statements of fact which are contradictory to the facts adduced, and the stipulation of facts, ignores certain pertinent issues, and reaches conclusions unsupported by the evidence, (3) that the examiner erred in concluding that the Company neither exercised control over, not had any [fol. 349] contacts with the drivers handling the loads other than to tender a bill of lading covering the shipments involved, (4) that the operations involved differ significantly from those which ordinarily occur when a for-hire carrier serves a shipper and in particular with respect to the control, direction, and dominance over the transportation exercised by the Company, (5) that the examiner should have found (a) that the Company keeps physicians' certificates and logs of all drivers, 2nd vehicle condition reports, and compies with appropriate safety regulations, (b) that the Company owns all equipment involved except 11 leased truck-tractors, (c) that the risk of cargo loss is upon the Company and no bill of lading is signed, (d) that the Company has the right to hire and fire drivers independently of the lease agreement, (e) that the leases involved are for a one-year term, (f) that the leased equipment is used to transport the Company's property exclusively, (g) that the Company exercises exactly

the same amount of control over drivers of leased tractors as drivers of Company-owned tractors, and (h) that driver's of Company-owned tractors, like the owner-operators, take their vehicles to and garage them at their homes, (6) that the examiner's findings and conclusions are not in accordance with the weight of the evidence and applicable law, and (7) that, inasmuch as private carriage is involved, application of the national transportation policy to the situation here is contrary to law.

The Bureau argues in reply that the contention that this Commission is without jurisdiction over respondents' activities is predicated upon the assumption that the considered transportation is *bona fide* private carriage, when [fol. 350] in fact the Company's status, whether as shipper or private carrier, is the principal question at issue in this proceeding. The Bureau asserts that in an effort to protect itself against breaches of trust on the part of the drivers, the Company has disassociated itself as much as possible from the actual operation of the leased vehicles and has assumed only such obligations of private carriage as would, in its opinion, give color and the form of legality to an otherwise unlawful operation. It argues further that the operations as conducted are inconsistent with a private-carrier's status and that respondent owner-operators, in concert with the Company, are shown to be engaged in a contract carrier operation, for compensation, in interstate commerce, without authority.

The evidence adduced, the examiner's recommendations, the exceptions, and the reply thereto have been considered. Our discussion will be confined to those matters covered by the exceptions and reply, and the facts, so far as necessary for determination of the questions involved, are restated herein. All exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions, have nevertheless been considered and found not justified or it has been found that consideration thereof is unnecessary to a proper determination of the issues presented.

[fol. 351] Exceptants' first contention is without merit. It is clearly within the scope of our powers and duties

to determine whether the leased equipment is operated in private carriage or under leasing agreements which actually mask a for-hire operation conducted in violation of the act. Compare *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361, 366; and *Driver Service-Tractra Rentals Division of Wisconsin A. & L. Co., Inc., and Wisconsin A. & L. Co., Inc.,—Investigation of Operations*, 77 M.C.C. 243. Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions, namely: (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for-hire. Compare No. MC-C-2102 *Louis, W, Soukup Et Al—Investigation of Operations and Practice*, , M.C.C. , (decided November 6, 1958). Both questions must be answered in the negative for us to conclude that the challenged operations are those of a bona fide private carrier.

In considering the primary question here in terms of who has the right to control, direct, and dominate the transportation performed, it is important to note the distinction between the situation wherein a person or persons other than the purported private carrier actually exercise control, direction and dominance of the operation involved and the situation wherein such person or persons have any [fol. 352] right to control, direct, and dominate the operation as actually conducted. We are here concerned with whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly performed by it as private carriage. In *H. B. Church Truck Service Co., Common Carrier Application* 27 M.C.C. 191, it was stated:

> —in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensa-

> tion, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of controlling the transportation service*, as for example, if the equipment were operated by the shipper's employee. [Emphasis added]

The presumption, as noted above, refers to the lessor of equipment as the "carrier", but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier". Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper. Another way of stating the presumption would read: In cases in which the question of the status created by a lease of equipment with drivers by a person (or persons acting in concert) to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by such person (or persons) as a carrier for compensation; in other words that it is for-hire transportation and as such is subject to regulation.

[fol. 353] In essence, respondents argue that this presumption has been overcome inasmuch as the Company: (1) loads and dispatches the shipments, (2) pays the owner-operators a salary for driving, (3) makes the usual payroll deductions, (4) has entered into a contract with the union with respect to employment of the owner-operators under which it has the power to hire and fire them as drivers, (5) requires the equipment involved to be devoted to its exclusive use, and (6) exempts the owner-operators from all responsibility for any losses sustained by it with respect to Company equipment, property, and cargo. All of these practices may tend or are designed to show that the owner-operators actually exercise little, if any, control, direction, and dominance over the considered operations, but they have little probative weight with respect to the question of whether the Company has the *exclusive right* to control, direct, and dominate the trans-

portation purportedly performed by it as private carriage.

In determining this question we must remember that the two significant instrumentalities of commerce with respect to motor carriage are (1) the equipment by which the transportation is accomplished and (2) the driver thereof. *Louis W. Soukup, case, supra.* Here each owner-operator supplies certain power units by which some transportation for the Company is accomplished and his own services as driver are ordinarily utilized by the Company in combination with his own power equipment. Determination of two exercises control over the considered operations is between the owner-operator who owns one significant instrumentality of commerce (the power equipment) and is himself the other significant instrumentality [fol. 354] (the driver), on the one hand, and, on the other, the Company which owns the commodities transported (and the trailer utilized) and which by agreement attempts to "assume" certain responsibilities for and control of the operation involved. On the facts presented in this proceeding, and bearing in mind that the basic issue for determination is whether a private or for-hire operation is being performed, under the described arrangements, we do not find that the Company in practice has achieved such exclusive control of both instrumentalities of transportation as will rebut the presumption that the operation is for-hire. Even if each owner-operator should be considered to be a bona-fide employee of the Company with respect to his driving duties, he does not lose his status as an independent contractor with respect to the equipment and his own services as a driver cannot be considered to take from him and give to the Company such control as would overcome the presumption stated in the *Church* case, *supra.* The close relationship between the owner-operator's status as a supplier of equipment and as an "employee" of the Company cannot reasonably be denied. There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists. We are satisfied that the Company does not have the exclusive right and privilege of controlling

the transportation service considered.

Considering the primary question here in terms of whether any person is engaged, in substance, in for-hire transportation we point out that the decision in *Fleming Common Carrier Application*, 8 M.C.C. 469, 470, noted:

[fol. 355] We conclude that the methods followed by applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

From this language it is implied that for-hire transportation can be accomplished by a carrier which provides (1) all of the equipment moving, (2) the power equipment only, or (3) none of the equipment moving.[5] Here we are concerned with whether each owner-operator is, in substance; engaged in for-hire (whether common or contract) transportation by the truckaway method providing power equipment only. Section 203(a)(15) of the act defines a "contract carrier by motor vehicle" in terms of engaging, for compensation, in (a) the furnishing of transportation services through the assignment of motor vehicles for a continuous period of time to the exclusive use of each person served or (b) the furnishing of transportation services designed to meet the distinct need of each individual customer. Inasmuch as the motor vehicle equipment of each owner-operator is exclusively devoted to the Company the type of for-hire operation with which the operation described here should be compared is that of a contract carrier by motor vehicle.

Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the Company, furnishing a service designed to meet the distinct need of the Company. He provides a service in which the equipment is furnished, maintained, and driven [fol. 356] by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite

[5] The provision of (1) or (2) is sometimes described as the truckaway method and the provision of (3) is sometimes described as the driveaway method.

cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses.[6] In short, the only points of *possible* difference between the service here provided and conventional contract carrier services are (1) the Company prefers to separate the functions of the owner-operator regarding him, insofar as the equipment is concerned, as a lessor, and, insofar as his driving services are concerned, as a Company employee, (2) the Company bears the cost of personal and property liability insurance upon the leased equipment, (3) the Company bears the cost of cargo insurance, and (4) the Company exercises certain control over the owner-operators as "employees". In *R.N.G. Commercial Auto Renters, Inc., Contr. Car. Applic.*, 73 M.C.C. 665, the Commission found that assignment of the driver to the vehicle, supervision of them as to their duties, instruction of them as to the delivery of the merchandise, and requirement of them to report their deliveries and to file delivery tickets or receipts, by the shipper, are natural concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper. And, as stated in *Motor Haulage Co., Inc., Contract Carrier Ap-*
[fol. 357] *plication*, 46 M.C.C. 107, 117, there is no provision in part II of the act or in our rules and regulations thereunder which require that a contract carrier by motor vehicle shall provide protection for shipments moving on its vehicles. Further, in *Louis W. Soukup* case, *supra*, it was noted that in the last analysis a shipper's assumption of any of a carrier's responsibility to the public, in this day when such responsibilities readily can be passed on to insurers, is little more nor less than a rate adjustment. Therefore (2), (3), and (4) above cannot be regarded as features of the service involved here which could distinguish it from contract carrier service.

There remains the question of whether the Company's

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[6] In addition to the other costs which are set forth specifically here there is in the case of each owner-operator a definite determinable deferred cost to the Company to be paid the following year in the form of "vacation pay".

separation of the functions of owner-operator is enough to change the basic character of the service performed by the owner-operator. In this connection the *Soukup* case, *supra.*, states:

> Pacific Diesel, alone, or in concert with one or more of the owner respondents, offers shipper respondents a service that differs essentially from conventional motor carrier service only in that a particular shipper adopts and purports to employ the driver supplied for the duration of any transportation accomplished. In *Shields Extension of Operations—Alliance, Ohio* 41 M.C.C. 100, the Commission, former division 5, found in a situation where applicant therein supplied equipment under lease accompanied, in some instances, by drivers who were paid by applicant and for whose service shipper reimbursed applicant and, in other instances, by other drivers paid by shipper, that, in fact, such payment or reimbursement amounts to nothing more than additional compensation for applicant's service, supplementing the amount specified in the written contracts between applicant and shipper. Its conclusions was that such applicant's operations (somewhat comparable to those described herein) con-
> [fol. 358] stitute carriage for-hire subject to regulation under Part II of the act. We are convinced here that, even if all the responsibilities of an employer with respect to the driver are assumed by a shipper, the service offered by Pacific Diesel, alone, or in concert with owner respondents, as appropriate, is, in substance, for-hire motor carriage subject to regulation under Part II of the act. To hold otherwise would be inconsistent with the remedial purpose of Part II and would be in contravention of our duty, imposed by Congress: (1) to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the act, (2) to foster sound economic conditions in transportation and among the several carriers, and (3) to *encourage reasonable charges* for the transportation service, *without* unjust discrimination, undue preferences or advantages, or *unfair or destructive competitive practices.* It is evident that,

> were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress.

Actually, the basic difference between the facts in this case and those in that case is that the equipment owners there were acting in concert with Pacific Diesel. Here, as there, we believe that it is evident that, were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress. We are convinced that the owner-operator respondents [fol. 359] here are, in substance, engaged in the business of interstate transportation of property on the public highways for-hire as contract carrier by motor vehicle.

In this record respondents make much of the fact that the Company requires physician's certificates, reports relative to the condition of the equipment utilized, and driver's logs from the owner-operators. In *A A Auto Delivery, Inc., Com. Car. Application*, 77 M.C.C. 365, a similar point was considered, and it was said:

> In determining questions directed to the ascertainment of the identity of the one actually conducting a transportation operation, whether it be a carrier, a shipper, or other individual, we have consistently looked to the one who exercises or can exercise control and domination over such operation. In certain cases, where there exists the possibility of evasion of the act through subterfuge and the elements of direction, control, and domination appear to compel the conclusion that the transportation operations involved constitute carriage by a shipper, we have also looked to the question of who is responsible to the

public. In such cases we recognize that any responsibility as a carrier retained, by a lessor of equipment or a supplier of drivers, for the operation of the vehicle, the action of the operators thereof, or the safe delivery of cargoes is inconsistent with such private carriage by the shipper and that the shipper must accept complete responsibility for the entire operation. Compare *Scott Bros., Inc., Contract Carrier Application*, 32 M.C.C. 253. In instances, however, where, as here, one party holds out a transportation service which it accomplishes under its own direction and control whether by or through its agents or employees, responsibility to the public (including the shipper) for such service must be accepted by the party holding out and performing the service and any understanding or misunderstanding to the contrary by those [fol. 360] concerned can be in no way determinative as to the identity of who is actually conducting the considered transportation operations.

Although the Company's requirements here tend to show that it, in good faith, is attempting to have the described arrangements conform to the practices of true private carriage and to abide by our safety regulation, such attempts are not determinative of whether the operations involved constitute private or for-hire carriage. Rather, the meeting of safety requirements is a duty which falls upon the actual carrier, whether private or for-hire, and the proper person to fulfill the safety requirements is a question secondary to determination of which person, in fact, is the carrier in the particular circumstances considered.

In summary, basically we have here a situation wherein a motor carrier service is being performed through and by the use of owner-operators whose business is the performance of transportation for compensation. Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for-hire; but once the owner-operators enter into the comprehensive arrangements here disclosed, they bring into life transportation services of which they

are the essential and moving part. No longer then are they merely unengaged persons; rather they become actively and primarily engaged in motor carrier services wherein they supply all the significant facilities for, and play the dominant role in, the provision of the actual transportation performed. In other words the Company provides the traffic and the owner-operators provide the transpor-[fol. 361] tation for which they are compensated as carriers and not as bona fide members of the Company's organization.

In view of our conclusion that the owner-operators are engaged in for-hire carriage, the question remains as to whether the Company has, in concert with the owner-operators, participated in their operations to a sufficient extent that it can be found to have participated in the violations of the act. We believe that the record is convincing that, though the efforts of the Company appear to have been directed to the accomplishment of private carriage partially exempt from regulation, it planned and fostered the method of operation of the for-hire carriers, relieved them of certain of the burdens of their for-hire transportation services, and otherwise participated in their violation of the act. A cease and desist order will be directed to the owner-operator respondents who are actually operating as for-hire carriers. It is noted, however, that the circumstances here are such that the described operations would not constitute a bar to our finding the owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy. Inasmuch as the cease and desist order directed to the owner-operators should result in discontinuance of the unlawful practices involved, it is deemed unnecessary at this time to direct any order to the Company.

We find that Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd [fol. 362] Shinn, and William M. Martin, severally, have been and are engaged in transportation of property, in interstate commerce for compensation, as contract carriers by motor vehicle, without appropriate authority, in viola-

tion of section 209(a)(1) of the Interstate Commerce Act.

An order will be entered (1) requiring respondents named in the preceding paragraph to cease and desist forthwith, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and (2) discontinuing the proceeding as to all other respondents.

COMMISSIONER WEBB, dissenting:

I am, and the respondents will be, puzzled by the rationale of the report in this proceeding. Archie Norris, Todd Shinn, and the other respondent owner-operators will be astonished to learn that they are contract carriers and not employees of the Oklahoma Furniture Manufacturing Co. Interspersed throughout the report are references to 15 indicia of private carriage not one of which is present in the typical contract carriage operation. The Oklahoma Furniture Manufacturing Co. (1) pays the owner-operators for driving; (2) deducts from their paychecks social security and federal income taxes; (3) provides Workmen's Compensation benefits; (4) retains the right to hire and fire drivers independently of the lease [fol. 363] arrangement; (5) bargains with a labor union respecting the wages of owner-operators and other conditions of employment; (6) provides the trailer; (7) has exclusive control over the use of all transportation equipment; (8) assumes full responsibility for maintaining such equipment in first class operating condition; (9) takes full responsibility for damage to cargo; (10) loads and dispatches the shipments; (11) issues detailed routing instructions; (12) issues no bill of lading; (13) keeps drivers' logs and medical certificates; (14) pays for public liability and property damage insurance, and (15) expressly reserves to itself the exclusive right to control and direct the transportation service involved. It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents.

The report lays down the following two tests:

> Determination of whether particular arrangements such as those involved here result in private opera-

> uons by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions, namely: (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for-hire.

As I see it, the second test indicated for determining whether a for-hire operation is conducted by a lessor is whether or not the lessor is engaged in interstate trans- [fol. 364] portation on the public highways for-hire. The report thus appears to conclude by *ipse dixit* that respondents are violators of the Interstate Commerce Act. Further, the report in referring to the *Church* case, *supra*, and the rebuttable presumption of for-hire transportation which arises from a lease of equipment with drivers by a carrier to a shipper, has this to say:

> The presumption, as noted above, refers to the lessor of equipment as the "carrier", but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier". Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper.

The meaning of the statement just quoted is far from clear. In any event, all the ambiguities in the report are dispelled and the indicia of bona fide private carriage are swept aside by one statement of exceptional clarity:

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.

No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds ap-

propriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the [fol. 365] existence of convincing facts to the contrary. The report, while holding up the single element of 'status' as the conclusive factor in determining who has the right to control and direct, is inconsistent in citing the *Church* case, *supra*, and the *R.N.G.* case, *supra*. The latter case contains the following statement:

> The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between applicant [lessor] and Gaylord [lessee], including particularly the actual practices in the conduct of the operation. No one element or circumstance is by itself conclusive. See *H. B. Church Truck Service Co. Com. Car. Application, 27 M.C.C. 191.*

In addition to its ominous implications, the report contains a few that are anomalous. For example, if Norris drives Shinn's tractor and Shinn drives Norris', both would probably be held to be engaged in private carriage. And this would be true even though all other aspects of the transportation service were identical to the arrangements condemned in this proceeding. Also, if a company driver owning no equipment drives Shinn's tractor and Shinn drives a company tractor, neither would be regarded as performing a for-hire service.

The report recognizes the harshness of its ultimate conclusion. Respondents are invited to apply for contract carrier authority and are informed that the operations interdicted by the report will not preclude a finding of fitness. If the respondents construe this as any implied promise to grant contract carrier authority they may be [fol. 366] disappointed. Contract carrier application proceedings must also consider an applicant's financial fitness and the factor of existing motor carrier service.

At the core of this decision is the false assumption that Archie Norris and Todd Shinn and the other respondents lease equipment with drivers to the shipper. They do no such thing. They offer their own services as employees and receive additional compensation because they them-

selves supply an expensive tool. This kind of employer-employee arrangement was far more common a century ago, but it has by no means disappeared from the contemporary economic scene. The cases cited in the report in support of the cease and desist order involved a person or firm who employed drivers, who owned equipment, and who made both available to the shipper or carrier, often under some subterfuge arrangement. Respondents here own equipment, do not employ drivers, make equipment available to the furniture company, and offer their services as employees of the company.

I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation. The impact of this decision on the Oklahoma Furniture Manufacturing Co. is negligible. It can buy respondents' tractors or it can rent tractors from a truck rental firm and pay respondents $50 a week plus 2 cents a mile for driving instead of 5 to 6 cents a mile for driving their own tractors and 10 to 14 cents per mile rental.

[fol. 367] If, as I imagine, there is a fairly high turnover of owner-operators serving a particular shipper or carrier, it is conceivable that thousands of applications would be filed with the Commission as a result of nationwide application of the novel rule of law enunciated in the report. However, this possible administrative nightmare is considerably less important than the unwitting, but nevertheless devastating blow which this report delivers to the property rights of numerous small entrepreneurs, as no doubt the tractors of many of the owner-operators involved in this proceeding were purchased at a considerable financial sacrifice. I am unable to find any justification for such a result either within the broad framework of the national transportation policy or within the interstices of Part II of the Interstate Commerce Act. Therefore, I cannot impose upon respondents here and others in a similar position what appears to me to be a legally unsupportable sentence of economic excommunication.

I would discontinue the proceeding.

—

[fol. 368] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22nd day of April, A. D. 1959.

No. MC-C-2143

OKLAHOMA FURNITURE MANUFACTURING CO., ET AL.—
INVESTIGATION OF OPERATIONS

This proceeding having been duly instituted, and full investigation of the matters and things involved having been made, and the said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn, and William M. Martin be, and they are hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations in interstate or foreign commerce of the character found in the said report to be unlawful, unless and until there is in force, with respect to such carriage, appropriate authority therefor;

It is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as June 10, 1959.

And it is further ordered, That the proceeding, as to all other respondents be, and it is hereby, discontinued.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

[fol. 369] BEFORE THE
INTERSTATE COMMERCE COMMISSION
Washington, D. C.

No. MC-C-2143

OKLAHOMA FURNITURE MANUFACTURING CO., ET AL.—
INVESTIGATION OF OPERATIONS
(Guthrie, Okla.)

ORDER—December 29, 1959

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition, dated May 27, 1959, of Oklahoma Furniture Manufacturing Co., et al., respondents, for reconsideration;

(2) Reply, filed July 17, 1959, by the Bureau of Inquiry and Compliance, Interstate Commerce Commission;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law.

By the Commission.

HAROLD D. McCOY,
Secretary.

[fol. 370] SUPREME COURT OF THE UNITED STATES

Nos. 608 and 609, October Term, 1960

UNITED STATES, ET AL., APPELLANTS

vs.

HENRY E. DRUM, ET AL.; and

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

vs.

HENRY E. DRUM, ET AL.

ORDER NOTING PROBABLE JURISDICTION—March 20, 1961

APPEALS from the United States District Court for the Western District of Oklahoma.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

March 20, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (pp. 19–32, *infra*) is not yet reported. The report of the Interstate Commerce Commission (pp. 34–60, *infra*) is reported at 79 M.C.C. 403.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398 and 2321–2325 to vacate, set aside, and annul an order of the Interstate Commerce Commission. The order of the three-judge district court was entered on August 13, 1960 (p. 33, *infra*). The United States and the Interstate Commerce Commission filed notices of appeal in the district court on October 12, 1960. The

jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1.

STATUTES INVOLVED

Sections 203 and 209(a) of the Interstate Commerce Act (49 Stat. 544, 552, as amended, 49 U.S.C. 303, 309(a)) provide in part as follows:

> SEC. 203(a). *Definitions.*
>
> As used in this part—
>
> • • • • •
>
> (15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.
>
> • • • • •
>
> (17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale,

lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 203(c). Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

* * * * *

SEC. 209(a)(1). Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *.

QUESTION PRESENTED

Whether transportation of a shipper's goods by motor vehicles driven and maintained by their owners, upon terms by which the shipper pays only a fixed

charge per mile for transportation actually performed and the owner-operators assume all the financial risks of engaging in transportation, constitutes "transportation * * * for compensation" performed by the owner-operators, subject to economic regulation under the Interstate Commerce Act, or private carriage performed by the shipper which is exempt from such regulation.

STATEMENT

1. Oklahoma Furniture Co. ("Oklahoma") transports a substantial part of its freight via trailers pulled by leased tractors. It leases the tractors from the owners and then employs the owners to operate them. It leases only one vehicle from each owner-operator. The leased vehicles are used solely to transport Oklahoma's freight.

The lease provides that Oklahoma has the sole right to control the use of the vehicles. The lease is to last for one year, but each party may cancel on 30 days notice. Payment for the use of the tractor is based exclusively on mileage. If the vehicle is not used, no payment is due. Oklahoma does not bind itself to provide the owner-operator with any freight to transport under either the lease or the union contract.

Oklahoma employs the owners as drivers. The drivers drive their own vehicles when they are able to do so, but occasionally others drive their vehicles and they drive the vehicles of others. The owner-operators receive pay for driving solely on the basis of mileage. If their services are not used they receive no pay. This contrasts with Oklahoma's treatment of the drivers it employs to drive its own vehicles. The latter receive a flat rate of $50.00 per

week plus mileage. The owner-operators and their vehicles are normally used on long trips while the other drivers and vehicles are used for travel nearer the plant.

The lease provides that Oklahoma has the right and duty to keep the vehicles in repair but is to bill the owners for parts. However, under the union contract governing the owner-operators, the responsibility for repair is passed back to them so that, in fact, as the court below recognized, they are responsible for both the labor and cost of parts used in repair. Thus, the actual situation is that Oklahoma inspects the vehicles for compliance with ICC regulation, but when defects are found the owner-operators have the responsibility for and control over the methods by which repairs are to be made and the party who is to make them. Ordinary running expenses are also paid for by the owner-operators.

Oklahoma decides when and where trucks are to go, loads them for outbound trips, and unloads the inbound shipments of raw materials. The lease agreements give Oklahoma the right to specify the route to be followed and, when sending the trucks out, Oklahoma loads the furniture in a way which controls the order in which stops must be made. The compensation is based on the shortest route between those stops.

Oklahoma carries liability insurance on the trucks and insures the cargoes. It does not protect the vehicles with insurance. It pays the owner-operators by one check for the use of their vehicles and by another for their services as drivers. It makes pay-

roll deductions from the latter paycheck for income tax withholding and Social Security.

2. In proceedings before the Interstate Commerce Commission initiated under § 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)), the Commission determined that the owner-operators were engaged in interstate transportation for compensation and entered an order directing them to cease and desist from engaging in such transportation without obtaining contract-carrier permits from the Commission, as required by § 209(a)(1) of the Act (p. 3, *infra*). Rejecting appellees' claim that the transportation was exempt private carriage (see § 203(a)(7), p. 2, *supra*) performed by Oklahoma itself, with the owner-operators acting solely as its employees, it held both that Oklahoma did not exercise complete dominion and control over the operation of the leased vehicles and that, in any event, the services performed by the owner-operators were essentially equivalent in character to those performed by contract carriers.

In proceedings under 28 U.S.C. 1336, 1398 and 2321–2325, the three-judge district court set aside the Commission's order (pp. 19–33, *infra*). It held that the Commission's findings that Oklahoma did not exercise complete control over the operations were not supported by substantial evidence and that, being subject to Oklahoma's control, the transportation here should properly be characterised as private carriage performed by Oklahoma itself rather than as the furnishing of transportation for-hire by the owner-operators.

THE QUESTION IS SUBSTANTIAL

This appeal goes only to the question whether, as the district court thought, the control exercised by Oklahoma over the operations is determinative or whether, as the Commission alternatively held, the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control. It is our position, in brief, that the characterization should turn, not upon control of the operations—an incident that may readily be shifted to suit the parties' convenience—but upon the more substantial incident of the financial burdens and risks of performing the service, with the party who bears the essential risks of engaging in the transportation business being treated as the person performing the transportation for purposes of the permit requirements. That presents, we believe, a question not only of substance but of broad importance to the regulation of the transportation industry.

1. The basic problem exemplified by this case—the diversion of traffic from the regulated carriers into unregulated modes of transportation—is one of constantly increasing importance. As noted by the Senate Committee on Interstate and Foreign Commerce in reporting the bill which became the Transportation Act of 1958 (S. Rep. 1647, 85th Cong., 2d Sess. (1958) pp. 23–24):

> A matter of serious concern to the committee is the growing practice of persons engaging

in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public transportation. * * *

* * * * *

There are numerous variations but, whatever the precise nature of the subterfuge em-

ployed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In recent years, the Congress has expressed repeatedly its concern with the erosion of the traffic available to public carriers, particularly common carriers. Thus, in 1957, following this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, Congress tightened the definition of "contract carrier by motor vehicle" in § 203(a)(15) of the Interstate Commerce Act.[1] Both in 1957 and in the Transportation Act of 1958 (72 Stat. 574) Congress amended § 203(c) in attempts to distinguish more effectively between bona fide private carriage and for hire transportation.

[1] The interpretation of the 1957 amendments is in issue in *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, No. 563, this Term, in which the Commission's Jurisdictional Statement was filed on December 5, 1960.

In June 1960, the Commission's Bureau of Transport Economics and Statistics prepared for the Senate Committee on Interstate and Foreign Commerce a study entitled *Gray Area of Transportation Operations*. "Gray area" was defined as "transport operations which lie between legitimate private carriage and the transportation authorized by Government regulatory bodies" (*id.* at p. i). The study found that various leasing devices, such as is involved in this case, "constitute the most prevalent type of gray area operation at present" (*id.* at p. 107),[2] and that "a large part of [the gray area operators'] traffic is a direct diversion from [authorized] carriers (*id.* at p. 108).

Nor is the problem solely one of the loss of volume by the regulated carriers, for the traffic diverted tends to be the more profitable traffic and that left to them, the less profitable. As the *Gray Area* study pointed out, "Two special aspects of the traffic diversion problem of authorized carriers are the loss of return haul traffic and the loss of profitable truckload traffic. The latter is often accompanied by an increased proportion of less-than-truckload traffic, which may be less economical or less convenient to handle" (*id.* at p. 108). The effect of the diversion of high-rated commodities and truckload shipments from the authorized public

[2] The question of determining what constitutes private carriage versus for-hire transportation has been before the courts frequently, *e.g. Bridge Auto Renting Corporation* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (E.D. N.Y.), affirmed, 331 U.S. 784; *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.); and see cases cited at page 15, *infra*.

carriers, relegating them to a stand-by basis and to handling the lower-rated commodities and less-than-truckload shipments, is, in turn, necessarily to impair their capacity to discharge their common carrier obligations—particularly to the many small shippers who depend upon common carrier service. As the *Gray Area* study concluded (pp. 108–109):

> Considering the long run interest of shippers and the general public interest in transportation, the continued development of gray area transportation could be detrimental in terms of fewer authorized carriers available, less frequent schedules, reduction in scheduled carrier equipment—in general, a decline in the quantity and/or quality of regulated for-hire transportation.

2. Bona fide private carriage is, of course, specifically exempted from the certification requirements of the Act, and to that extent the Commission cannot prevent the diversion of traffic from the regulated carriers. There are, however, inherent disadvantages in a shipper's undertaking private carriage which provide a natural limitation on the extent of such diversion. Investment in equipment is required, and employment of drivers means increased payroll obligations. Efficient utilization of both equipment and men requires close supervision and experienced management,[8] and for a company without experience in the transportation business the risks of loss are substantial, particularly if, as is often the case, the vol-

[8] It was, for example, because of Oklahoma's inability to prevent credit-card abuses by its drivers that it abandoned the use of its own trucks on long hauls (pp. 20–21, *infra*).

ume of shipments is small or is subject to both seasonal and short-term fluctuations. Thus, so long as shippers can undertake private carriage only by assuming those risks and burdens, natural economic forces provide a limit upon the extent of diversion of traffic from the regulated carriers.

The decision below, however, removes that limitation. By making the single element of control determinative, it permits Oklahoma, by the simple device of contracting for "control" of the operations, to obtain transportation at a fixed cost per mile, not subject to the Commission's regulation, while at the same time leaving to the owner-operators the entire risk of loss, both of time and of money, arising from the vicissitudes of the transportation business. Under the leasing arrangements between Oklahoma and the owner-operators, the owner-operators provide the vehicles, drive them themselves (except in exceptional cases), and bear the entire risk that the investment of time and money will be unprofitable, being entitled to payment from Oklahoma only at a fixed cost per mile for transportation actually performed. The owner-operators thus bear the initial investment, all costs of operation and repair, the risks of breakdowns and road delays, and, perhaps most significant of all, the entire burden of nonutilization. The only risk assumed by Oklahoma in the operation of the tractors[4] is that of liability to the public, which, being passed on to insurers, amounts ultimately to no more than a

[4] Oklahoma does provide the trailers and bear the cost of cargo insurance, but that of course is typical of the contract carriage to which the Commission equated the operations here.

rate adjustment. The net result, in short, is that Oklahoma is buying transportation at a fixed cost per mile from owner-operators who bear all the financial risks of engaging in transportation.

In permitting that result, the court below gave to the single element of control a significance that cannot be justified in terms of any purpose relevant to the certification requirement.[8] Exclusive use of the vehicles and control over such matters as loading and order of deliveries may of course be of substantial importance to the shipper to assure prompt and reliable transportation of his goods, but such elements of control are common between shippers and contract carriers, who often devote equipment to the exclusive use of a single shipper. The elements of shipper control present here which *distinguish* the arrangements from those with the usual contract carrier—"control" over such matters as repairs, specific choice of routes between intermediate delivery points, etc.—are not matters of substantial concern to the shipper, and his assumption of control, unaccompanied by financial responsibility, is likely to be formal at best. Those are matters that directly affect only the person bearing the costs of operation, and the contractual assumption of the right to control such matters by a shipper divorced from the financial consequences of their efficient management is, we submit, an incident of no sub-

[8] The *absence* of control by the purported private shipper is of course normally dispositive, and it is for that purpose that the Commission has used the test (see *e.g.*, *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161), but it does not follow that the *presence* of shipper control is by itself enough to qualify the transportation as private carriage.

stantial significance in characterizing the relationships created. The effect of making those incidents determinative is simply to give to the parties the power, without affecting their own interests in any substantial way, to contract themselves out of the regulatory scheme.

3. The allocation of the financial burdens and risks of the transportation service provides what we believe is a much more substantial basis for distinction between private carriage and contract carriage. The financial risks are of course the incidents that are of primary concern to the parties and the ones that dictate their choice among the alternative arrangements. They should also, we believe, determine the characterization of the transportation as private or contract carriage.

In the first place, a standard based on the financial relationships seems to conform more literally to the language of the Act than does a "control" test. The Act defines as a "contract carrier" any person who "engages in transportation * * * [of property] for compensation" (§ 203(a)(15)). The distinction that the Act suggests between private and contract carriage is whether it is "transportation" as such that is being purchased, or whether the shipper separately acquires the factors of which transportation is made up (labor, equipment, fuel, etc.) and himself combines them into a functioning transportation facility.

In form, of course, the owner-operators here do purport, by virtue of the separate leasing and collective bargaining agreements, separately to "sell"

their labor and the use of their trucks. It is the economic reality behind the arrangements, however, not their form, which is crucial in determining the status of a carrier. *United States* v. *La Tuff Transfer Service,* 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner,* 92 F. Supp. 582 (E.D. Mich); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.,* 78 F. Supp. 13 (D. Minn.). The economic reality here is that, because the owner-operators assume all the financial risks and bear all the variable costs, Oklahoma is in the end required to pay only a pre-determined fixed cost per mile for such transportation services as are actually performed. That is, what Oklahoma pays for is transportation services as such, not hours of labor or use of vehicles. The compensation is unrelated to hours and there are none of the usual fixed charges of equipment leases—a daily "overhead" charge for the use of the vehicles or at least a minimum mileage guarantee.

In substance, therefore, it is transportation as such for which Oklahoma pays. It necessarily follows that it is "transportation", and only transportation, for which the owner-drivers are "compensated". In short, where, as here, the owner-operators bear all the financial risks so that the shipper is assured of transportation services at a fixed cost per mile, they are engaged, not in selling labor and leasing trucks, but in providing "transportation * * * for compensation". As such, they are literally within the statutory definition of "contract carrier by motor vehicle" (§ 203(a)(15)).

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Moreover, making the exemption of private carriage turn upon the shipper's assumption not simply of "control" of the transportation service, but of the concomitant financial risks as well, furthers the broad purpose of the Act to protect those who assume the burdens and responsibilities of public carriers against the siphoning-off of the more profitable traffic into extra-regulatory transportation arrangements. Shippers are still free, so long as they are willing to assume the financial risks of the operations, to turn to private carriage. But that requirement tends to limit private carriage to circumstances in which it offers true efficiencies of operation. The decision below, on the other hand, permits shippers, without assuming that burden, to divert traffic from regulated carriers to unregulated owner-operators virtually at will. That affords an opportunity that will be availed of, we submit, not because it reflects a more efficient organization of the transportation industry, but simply because the unregulated competition among owner-operators permits shippers to obtain lower rates than those of the regulated carriers. The result, if the decision below is allowed to stand, can only be to encourage a substantial diversion from the regulated carriers of the more profitable traffic essential to a viable public transportation system.

CONCLUSION

We submit that the question of whether an effective line is to be drawn between private carriage

and for-hire transportation is substantial and of such public importance as to require plenary consideration, with briefs and oral argument, for its resolution.

Respectfully submitted.

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DECEMBER 1960.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, ET AL., PLAINTIFFS, *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before MURRAH, *Chief Judge,* CHANDLER, *Chief Judge,* and RIZLEY, *District Judge.*

CHANDLER, *Chief Judge.*

OPINION

Plaintiffs instituted this action under 28 U.S.C. Sections 1336, 1398 and Sections 2321 through 2325 to vacate, set aside and annul certain orders of the Interstate Commerce Commission entered in a proceeding initiated by the Commission on its own motion under Section 204(c) of the Interstate Commerce Act (49 U.S.C. Section 304(c)), and to enjoin the Commission from enforcing or attempting to enforce said orders.

The Commission by order of August 28, 1957, began an investigation under said Section 204(c) of the Act to determine whether the individual plaintiffs, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn and William M. Martin,[1] were engaged

[1] Marion W. Daves is no longer employed by Oklahoma Furniture Manufacturing Co. and William M. Martin is now deceased.

in transportation of property in interstate or foreign commerce for compensation as common or contract carriers by motor vehicle, in violation of Part II of the Interstate Commerce Act, and whether the plaintiff Oklahoma Furniture Manufacturing Co. had participated in any such violation. In its report the Commission found that the individual plaintiffs had been and were engaged in transportation of property in interstate commerce for compensation as contract carriers by motor vehicle without appropriate authority in violation of Section 209(a)(1) of the Interstate Commerce Act (49 U.S.C. Section 309(a)(1)) and entered an order requiring said plaintiffs to cease and desist from all operations found in the report to be unlawful. A petition for reconsideration and exception to said report and order were filed by plaintiffs and denied by the Commission by order of December 29, 1959.

The Regular Common Carrier Conference of American Trucking Associations, Inc. has intervened in this action in support of defendants' position and Weather-Seal, Inc. has intervened in support of plaintiffs' position.

Oklahoma Furniture Manufacturing Co. (hereinafter referred to as the Company) is engaged in the manufacture of furniture at Guthrie, Oklahoma, which it sells to retail furniture dealers throughout the United States. The Company owns six tractors and seventeen trailers, and in addition to this equipment leases a tractor from each of the individual plaintiffs (hereinafter referred to as owner-operators) under separate lease agreements. All this equipment is used in the interstate transportation of the Company's furniture to retail dealers and in the back-haul of raw materials to the Company. Prior to 1952 the Company carried on all its transportation of goods in

company-owned equipment operated by employees of the Company, but upon discovering that the drivers were defrauding it by improper use of credit cards, the Company changed to a system of operation whereby each driver owned and maintained his own tractor, which was leased to the company with the driver being paid on a mileage basis. To effectuate this method of operation, the Company entered into a lease agreement with each driver. These initial leases were subsequently replaced by others which were, in turn, replaced by the present leases with which we are here concerned.

The leases provide in substance as follows: (1) the Company shall pay the owner-operator 10¢ a mile for hauling single-axle trailers and 11¢ a mile for hauling tandem-axle trailers, plus an additional 3¢ a mile for back-haul of the Company's raw materials, (2) payments under the agreement shall be made weekly, (3) motor vehicles covered by the agreement shall be operated by an employee of the Company who shall be properly qualified and physically fit in accordance with state and federal regulations, (4) the owner-operator shall pay all operating costs arising from operation of said equipment (gasoline, oil, grease and parts) and shall pay cost of license plates, (5) the Company shall keep and maintain said equipment in first-class operating condition and in compliance with all safety rules and regulations of state and federal regulatory bodies, (6) if owner-operator fails to pay operating cost of equipment, the Company may cancel the agreement or at its option pay the necessary operating costs and charge same to owner-operator's account with the Company, (7) the Company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the Company and the

Company will not sublease the equipment to any other person, firm or corporation, (8) the Company shall not be liable for wear, tear and depreciation nor for any damage caused to the leased equipment by accident, theft, fire or any other hazard or casualty, (9) the owner-operator shall not be responsible for loss to company equipment, property and cargo, (10) the Company will have the name of the owner-operator endorsed as an additional assured upon its policies of property damage and public liability insurance covering the operation of motor vehicles, (11) either party may cancel the lease upon giving 30 days' written notice to the other party, (12) the agreement shall remain in full force and effect for one year from date of execution and shall be automatically renewed for further periods of one year unless cancelled in accordance with provisions of the agreement, or terminated by operation of law.

The Company also entered into a union contract as employer of its drivers. The contract covers both drivers of company-owned vehicles and the owner-operators who usually drive their own tractors and who are also treated by the Company as employees. Although all the drivers do not belong to the union, the terms of the contract apply equally to non-union employees. This contract provides, in pertinent part, as follows: (1) the Company may discharge any employee for cause, (2) the owner-operators shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cents a mile for living expenses, and 0.25 cents a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, and shall be paid 6 cents a mile for backhauls of raw materials, (3) drivers of company-owned tractors shall receive a basic salary of $50.00 a week plus 2 cents a mile for driving, (4) owner-operators having driven 75,000 miles during a year in which the

contract is in effect shall be entitled to vacation pay computed upon the rate of pay for driving and the average weekly mileage in the preceding year, (5) owner-operators shall maintain their trucks in good running condition at all times, (6) owner-operators shall pay their own living expenses while on the road, (7) the provision of the union contract which guarantees employees 6 hours work or pay if they report for work at their usual or regular time shall not apply to owner-operators.

The record made before the Commission shows that the operations of the Company and the owner-operators are in substance carried on in accordance with the provisions of the lease agreements and the union contract, with one exception. The lease agreements provide that the Company shall maintain the tractors of the owner-operators and the union contract provides that the owner-operators shall maintain them. The testimony in the record supports the Commission's finding that the owner-operators in fact maintain their vehicles.

The record also reveals the following: The owner-operators are not authorized by the Interstate Commerce Commission to engage in the transportation of property either as contract carriers or common carriers by motor vehicle in interstate commerce. The Company uses the 6 tractors which it owns chiefly for short hauls and these are usually driven by the salaried company drivers. The tractors leased by the Company are utilized chiefly for long hauls and are usually operated by the owner-operators, each driving his own tractor. It is the practice of the Company to assign the same driver to the same equipment, regardless of whether it is company-owned or leased. However, when necessity or convenience make it more feasible to do so, drivers who usually drive

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company-owned tractors are assigned to leased tractors and owner-operators to company-owned tractors. All trailers used in the Company's operations are owned by it. A supervisor employed by the Company oversees all drivers, assigns trips and checks to see that all equipment is properly maintained and repaired. Detailed routing instructions are issued to all drivers and compliance therewith is insured by manner of loading, e.g., last goods to come off are loaded first and the first to come off are loaded last. Prior to departure drivers are handed a truck bill manifest which differs from a bill of lading in that the drivers are not required to sign a receipt for the freight they transport. Each owner-operator receives two weekly paychecks, one for rental of his tractor and the other for his service as a driver. The Company deducts from the paychecks of the owner-operators social security and withholding taxes, pays the employer's share of social security and provides workmen's compensation benefits for them. The Company maintains on file drivers' logs, physicians' certificates and vehicle inspection reports. Both company-owned tractors and leased tractors are garaged at the homes of their respective drivers. The Company has the right to hire and fire drivers independently of the lease agreement.

The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F. 2d 358, put it, "Simply stated it is who was transporting the goods in question," that is, whose operations in interstate transportation were these, those of the Company or those of the owner-operators?

The pertinent statutes involved are as follows: 49 U.S.C. Section 303(a)(15) provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation refered to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

49 U.S.C. Section 303(a)(16) provides:

> The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

49 U.S.C. Section 303(a)(17) provides:

> The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

49 U.S.C. Section 304(c) provides:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant

> thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

49 U.S.C. Section 309(a)(1) provides in part:

> Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *

49 U.S.C. Section 42 provides:

> In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

The parties appear to be in some slight disagreement as to the scope of judicial review of an order of the Commission. The defendants contend that "The

judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282. They further contend that the court can only determine whether or not the Commission's findings are supported by substantial evidence. *Riss & Co., Inc.* v. *United States,* W.D. Mo., 100 F. Supp. 468, affirmed 342 U.S. 937, rehearing denied 343 U.S. 937. Plaintiffs, on the other hand, state that a reviewing court when passing on the validity of a Commission order should ascertain whether it is supported by *substantial evidence on the record considered as a whole. Coyle Lines* v. *United States,* E.D. La., 115 F. Supp. 272. While this court recognizes the distinction emphasized in the latter case, it nevertheless feels that even under the rule as set forth by defendants a reviewing court will consider the whole record in determining whether there is substantial evidence to support such an order.

Plaintiffs allege that the Commission was without jurisdiction to initiate its investigation into the operations of plaintiffs for the reason that it proceeded under 49 U.S.C. Section 304(c) which only authorizes it to investigate motor carriers and brokers and that since the term "motor carrier" includes only common carriers and contract carriers, the Commission had no authority to investigate the operations of the Company because it is a shipper and a private carrier. In view of the fact that 49 U.S.C. Section 303(c), 49 U.S.C. Section 306(a)(1) and 49 U.S.C. Section 309 (a)(1) prohibit any person from engaging in operations as a common carrier or contract carrier without an appropriate certificate or permit issued by the Commission and that 49 U.S.C. Section 304(c) authorizes the Commission to investigate whether any motor carrier has failed to comply with any provision of

Part II of the Act, and after notice and hearing, to issue any appropriate order to compel compliance, it necessarily follows that the Commission has the right, power and duty to inquire into operations such as those involved here to ascertain whether persons are in fact carrying on common carrier or contract carrier operations in violation of the Act. It is therefore evident that the Commission had jurisdiction as regards the owner-operator plaintiffs and 49 U.S.C. Section 42 granted the Commission authority to join the Company.

In reaching its decision on the primary issue herein involved, the Commission utilized two tests: (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. Both tests have been approved by the courts. See *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, D. Minn., 78 F. Supp. 13, where the court stated:

> In order for the operations to be those of the shipper as a private carrier there must be a clear and unequivocal showing that the shipper exercises control and responsibility over the operations of the vehicle, such as would be exercised by it if it were the owner of the vehicle.

See also *Interstate Commerce Commission* v. *Gannos*, W.D. Pa., 100 F. Supp. 790; *Motor Haulage Co.* v. *United States*, E.D.N.Y., 70 F. Supp. 17, affirmed 331 U.S. 784; *United States* v. *La Tuff Transfer Service*, D. Minn., 95 F. Supp. 375. In regard to the second test mentioned, see *Georgia Truck System Inc.* v. *Interstate Commerce Commission*, 5 Cir., 123 F. 2d 210; *Lamb* v. *Interstate Commerce Commission*, supra;

A. W. Stickle Co. v. *Interstate Commerce Commission*, 10 Cir., 128 F. 2d 155, cert. den. 317 U.S. 650.

In addition to these tests the Commission also relied upon a rebuttable presumption (which defendants state is essentially an inference) set forth by the Commission in *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, as follows:

> * * * in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation.

This "presumption" has been indirectly recognized by the courts. See *Motor Haulage Co.* v. *United States, supra*, and *Interstate Commerce Commission* v. *Gannoe, supra*. It will be noted, however, that in the above cited *Church* decision the Commission stated that the presumption arises only "in the absence of a showing to the contrary," and that "This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of controlling the transportation service, * * *" The Commission in that decision further stated:

> The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No element of such facts and circumstances is by itself controlling.

The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the *Church* case by the following declaration:

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.

This is true unless, of course, the Commission formulated a new rule, thinking as this court is inclined to think, that this situation does not technically justify application of the presumption because it is not one involving "a lease of equipment with drivers by a carrier to a shipper," but a lease of equipment alone with the drivers to be supplied by the Company. In any event, the court does not agree with the reasoning of the Commission that the quoted conclusion necessarily follows.

The record before the Commission discloses that there was more than sufficient evidence to rebut any presumption or inference of transportation for-hire. The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith. The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves.

As is urged by defendants, substance, not form, should be the governing factor in determining whether these operations constituted transportation for-hire on the part of the owner-operators. *United States* v. *La Tuff Transfer Service, supra; Georgia Truck System, Inc.* v. *Interstate Commerce Commission, supra.* In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here is private carriage on the part of the Company,

rather than transportation for-hire by the owner-operators. The Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. The change in form alone did not change the substance of the Company's operations. The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles.

Defendants contend that there are three aspects of this transportation which the owner-operators retained a right to control. First, it is alleged that since the owner-operators are responsible for the maintenance of their own vehicles, they have the right to decide where and what kind of repairs are to be made. The testimony before the Commission shows that Company personnel oversee maintenance and repairs of all equipment used by the Company; that the owner-operators have to meet the requirements of the Company as to state of repair and that their equipment is checked by Company personnel periodically to ascertain whether it meets certain requirements and whether specified repairs have been made. There is, therefore, no real control over maintenance exercised by the owner-operators. Second, defendants point out that the owner-operators garage their tractors at their homes and that they could use them for their own purposes and could even haul for others. Since drivers of company-owned vehicles also garage the vehicles they drive at their homes, no element of control appears by virtue of the fact that the owner-operators have that right. And, it appearing that the owner-operators are on call at all times to haul Company goods, it is far-fetched to speculate that they might possibly breach their lease agreements in order to haul for someone else. There is no evidence of any

of them ever having done so. Third, defendants contend that the owner-operators retain considerable right to control their vehicles while driving them for the Company and that there is a possibility of a conflict of interest, say in a situation where an owner-operator might have to choose between stopping immediately to make repairs, thereby arriving late with a shipment, or continuing at the risk of incurring more expensive repairs. All drivers have some independent decisions to make, and as to *possible* areas of conflict, these are *conjectural only* and not of such stature as to constitute an element of control on the part of the owner-operators.

As was pointed out in the dissent to the Commission report, and the statement is equally applicable here, the cases most heavily relied on by the Commission to support its order involve a person or firm owning equipment, employing drivers and making both available to the lessee, or in some cases, to several lessees. The facts here are materially different. In addition, in each of the cases relied on by defendants, there was some element of control long considered important by the courts and the Commission which was retained by the lessor; or there were some duties which ordinarily fall on the carrier, private or otherwise, which were assumed by the lessor or no one.

Upon consideration of the record, the court concludes that the findings of the Commission are not supported by substantial evidence. For that reason the cease and desist order entered against the owner-operators must be set aside. Judgment will be entered accordingly.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, ET AL., PLAINTIFFS *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER

Now on this 13th day of August, 1960, in accordance with the opinion of the court filed herein this date, the orders of the Interstate Commerce Commission entered in these proceedings are hereby vacated, set aside and annulled.

/S/ STEPHEN S. CHANDLER,
Chief Judge.

Filed Aug. 15, 1960.

VERA L. HOWARD,
Clerk, U.S. District Court.
By /S/ VERA EDDLEMAN,
Deputy.

APPENDIX B

Interstate Commerce Commission

No. MC–C–2143

OKLAHOMA FURNITURE MANUFACTURING CO. ET AL.—
INVESTIGATION OF OPERATIONS

Decided April 22, 1959

1. Furnishing of truck-tractors and drivers by certain respondent owner-operators to respondent Oklahoma Furniture Manufacturing Company found under the circumstances disclosed, to constitute operation by the owner-operators as contract carriers by motor vehicle in violation of the provisions of the Interstate Commerce Act. Cease and desist order entered.
2. Proceeding discontinued as to all other respondents.

Walter D. Hanson for respondents.

Ellis V. Gregory, Lloyd R. Reeder, and *William W. Guild* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by respondents jointly, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied.

By order entered August 28, 1957, division 1 instituted an investigation under section 204(c) of the Interstate Commerce Act into and concerning the motor-carrier operations and practices of respondents, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Robert A. Custard,[1] Charles W. McGee, Todd Shinn, and William M. Martin, hereinafter collectively referred to as the owner-operators, to determine whether they have been or are engaging in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle in violation of any of the provisions of part II of the Interstate Commerce Act, or of any requirements established pursuant thereto and whether respondent, the Oklahoma Furniture Manufacturing Company, hereinafter referred to as the company, has, in concert with the aforementioned parties, participated in said violations; to determine what orders should be entered to remove any unlawfulness found to exist; and for the purpose of taking such other and further action as the facts and circumstances may appear to warrant.

The order of investigation recited that there is reason to believe that the respondents have been or are engaging or participating in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle subject to the provisions of part II of the act

[1] Subsequent to the entry of this order and prior to the hearing, Robert Custard terminated his vehicle lease contract with respondent Oklahoma Furniture Manufacturing Company, and the latter entered into a similar equipment leasing arrangement with Charles McGee, of Guthrie, Okla. By stipulation between the parties it was agreed that McGee be substituted in place of Custard as a respondent in this proceeding.

between Guthrie, Okla., and points throughout the United States, without there being in force a certificate of public convenience and necessity or a permit issued by the Commission authorizing any of the aforementioned parties to engage in operations as a common or contract carrier.

The company, at Guthrie, manufactures furniture which is shipped, in company-owned trailers pulled by either company-owned or leased motor equipment, to dealers located at points throughout the United States. The same equipment is usually utilized on return trips to Guthrie to carry raw materials which are used by the company in the manufacture of its products. The company owns 6 tractors which are operated by salaried drivers and 17 trailers which are pulled by its own tractors or those individually owned by and leased from owner-operator respondents. Prior to 1952 the transportation was performed wholly in company-owned units driven by salaried employees. In 1951 the company discovered upon investigation that it was being defrauded by most of its drivers through the improper use of the credit cards which had been issued to them. The delinquent drivers were discharged and the company began to use leased owner-operators' tractors. In 1955 after one owner-operator was arrested in Arkansas for operating without appropriate authority, a suit was filed in the civil courts of that State for a declaratory judgment as to whether the owner of the tractor was required to obtain a permit from the Arkansas Public Service Commission. In *Robinson* v. *Woodard*, 227 Ark. 102, 296 S.W. (2d) 672, decided December 10, 1956, the Supreme Court of Arkansas held that the arrested owner-operator was performing service, not as an employee of the company, but as a motor contract carrier operating unlawfully in Arkansas.

The fact that the owner-operator was required to pay the costs of operation was found to be incompatible with private carriage under a section of the Arkansas statutes which reads:

> Any person, who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission [Arkansas Public Service Commission], and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier.[2]

Review of the decision of the Arkansas Supreme Court by the United States Supreme Court was sought but certiorari was denied. Subsequent thereto, in or about July 1957, the company canceled all prior agreements and entered into new equipment leasing arrangements specifically drawn and designed to insure that its use of leased tractors driven by the owners would be bona fide private carriage within the meaning of applicable State and Federal law. It is these arrangements and the transportation provided thereunder with which we are here concerned. The written leases entered into between the company and each of the owner-operators uniformly provide in substance that (1) during the term of the lease, the company shall pay the owner-operator 10 or 11 cents a mile, depending upon whether a single-axle or tandem-axle trailer is utilized, for each mile the unit

[2] The term "motor carrier" under the applicable Arkansas statute includes both a common carrier by motor vehicle and a contract carrier by motor vehicle and any person performing for-hire transportation service without authority from the Arkansas Public Service Commission.

is operated, plus an additional 3 cents a mile on backhauls of the company's raw materials which usually are heavier than outbound cargoes, (2) payments under the agreement shall be made weekly, (3) the motor vehicles covered shall be operated by an "employee" of the company who shall be properly qualified and physically fit in accordance with State and Federal regulations, (4) the owner-operator shall pay all operating costs including the cost of gasoline, oil, grease, and parts, and at his own expense shall procure the Oklahoma commercial license plates to be used on the said equipment, (5) the company shall keep and maintain said equipment, at all times while in operation under this lease, in first-class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies, (6) in the event of the owner-operator's failure to pay the operating costs, the company may, at its own option, cancel the agreement forthwith or pay the necessary operating costs and expenses and charge the same to the owner-operator's account with the company, (7) the company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the company, and the company will not sublease the equipment of any other person, firm, or corporation, (8) the company shall retain from all rental compensation due to the owner-operator 5 percent thereof, until the amount of $1,000 has accumulated, (9) this sum shall be refundable to the owner-operator, less any expense which the company is forced to pay for the account of the owner-operator, or any other sums due the company under the contract, (10) the company shall not be liable for any damage caused to the leased equipment by accident, theft, fire, or any other hazard or casualty, (11)

the company will have the owner-operator's name endorsed with its own as an additional assured upon property damage and public liability insurance policies covering the operation of motor vehicles, but shall not be required to carry collision, fire, theft, or any other type of insurance for the owner-operator's account; and, if the owner-operator himself carries such insurance, it shall be at his sole cost, but the owner-operator shall not be responsible for any loss to company equipment, property, or cargo, (12) either party may cancel the lease upon the giving of 30 days' written notice to the other party, and (13) the agreement shall remain in full force and effect for a period of 1 year from the date of the execution, unless ordered terminated by operation of law, by the mutual consent of the parties, or by virtue of any other provision of the contract.

The company pays the social security taxes upon, and withholds income taxes from, the wages of the owner-operators, as well as providing workmen's compensation benefits. It carries public liability and property damage insurance on the leased units and cargo insurance on the lading transported by such units. The owner-operators are shown as assureds or beneficiaries in the liability insurance policy carried by the company. This liability insurance is in force at all times on the leased tractors, whether they are pulling company trailers or are being used by the owner-operators as a method of transport between the company's place or business and their homes. The company maintains on file physicians' certificates, drivers' logs, and vehicle inspection reports.

The company has entered into a contract with the United Furniture Workers of America, AFL–CIO, as employer of certain of the owner-operators. Although not all of the latter are members of the union,

arrangements specified in the contract are applicable to the company's nonunion employees. Among other things, the union contract provides that the company may discharge any employee for cause; that the owner-operators shall maintain their trucks in good running condition "at all times" [3] and pay their own living expenses while on the road; and that they shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cent a mile for living expenses, and 0.25 cent a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, increasing to 6 cents a mile on a return movement of raw materials. The contract with the union covering owner-operators further stipulates that any owner-operator who has driven at least 75,000 miles during a year in which the contract is in effect shall be entitled to vacation pay (for 1 or 2 weeks depending upon his length of service with the company), computed upon the rate of pay for driving and the average weekly mileage in the preceding year. The union contract exempts owner-operators from those provisions which guarantee employees 6 hours work or pay if they report for work at their usual or regular time and drivers of company-owned tractors a specified minimum weekly salary. The drivers of company-owned tractors, also under contract, receive a basic salary of $50 a week plus 2 cents a mile for driving.

Each owner-operator receives two weekly paychecks, one covering the rental for the use of his tractor, and the other for his service as a driver. If for some reason the owner-operator is unable to drive his own tractor, it may be assigned to another driver, with the lessor continuing to receive compensation for

[3] This contract provision is inconsistent with provision (5) set forth above in reference to the leasing agreement between the company and each owner-operator.

the use of his tractor. In the event that an owner-operator exchanges tractors with another driver, his compensation would be based upon the mileage driven by him at the driving rate plus the mileage his tractor is operated by the other driver at the rental rate. Ordinarily the company uses the owner-operator on his own equipment. An instance to the contrary would be a situation arising when an owner-operator's equipment is disabled at a time that a driver of a company-owned (or leased) tractor is ill. The owner-operators pay for maintenance and repairs on their own equipment and use their tractors exclusively in the service of the company.

The service of each owner-operator is not used every day. If the company does not call him, he calls in to find out if he is to be loaded out. On days that his services are to be utilized he arrives at the company with his tractor and checks the bulletin board to find out whether he is supposed to go out on a trip. When there is a trip arranged he connects his tractor with a tandem or single-axle trailer of the company, which is loaded by yard employees of the company. The owner-operators are instructed as to the shortest routes, from the origin to the first delivery point and between the various points of delivery, upon which compensation is based and "which naturally they follow." Prior to departure the owner-operator is handed a truck bill manifest, which differs from a conventional bill of lading in that the owner-operators are not required to sign a receipt for the company freight they transport. The owner-operator pays all of the expenses of operation. After reaching his ultimate destination, the owner-operator picks up a load of inbound materials and returns it to the company plant. At the plant he files a repair report, unhooks

the trailer and goes home. The owner-operators garage their tractors at their homes.

The company's customers are not billed directly for transportation costs. Instead the company has divided the United States into zones and sells its furniture at a delivered price which varies according to the zonal location of the customer. Generally speaking, the more distant the zone from Guthrie the higher the delivered price; but in some instances, as where a lower price is required to meet competition or in a zone where the company purchases raw materials, or as between two points in the same zone, the converse is true.

There is no question but that the company's primary business is furniture manufacturing and that the transportation service performed in the company-owned units is incidental to its primary business.* Its utilization of company-owned tractor-trailer units driven by regular salaried drivers for transportation purposes is clearly private carriage. The substantial or primary issue here is as to whether those operations utilizing leased equipment of the owner-operators with their services as drivers are private carriage performed by the company or for-hire carriage performed by the owner-operators.

The examiner concluded that the operation of the leased tractors, although ostensibly controlled by the company, is actually controlled by the owner-operators; and that respondents have engaged in the transportation of property in interstate commerce for compensation without authority and in violation of the act; and he recommended that a cease and desist order be entered.

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*See section 203(c) of the Interstate Commerce Act as amended in August 1958.

Respondents contend on exceptions (1) that the described transportation is not subject to our licensing jurisdiction inasmuch as the company is purportedly a private carrier and the owner-operator purportedly its employee, (2) that the examiner's report contains statements of fact which are contradictory to the facts adduced, and the stipulation of facts ignores certain pertinent issues, and reaches conclusions unsupported by the evidence, (3) that the examiner erred in concluding that the company neither exercised control over, nor had any contacts with the drivers handling the loads other than to tender a bill of lading covering the shipments involved, (4) that the operations involved differ significantly from those which ordinarily occur when a for-hire carrier serves a shipper and in particular with respect to the control, direction, and dominance over the transportation exercised by the company, (5) that the examiner should have found (*a*) that the company keeps physicians' certificates and logs of all drivers, second vehicle condition reports, and complies with appropriate safety regulations, (*b*) that the company owns all equipment involved except 11 leased truck-tractors, (*c*) that the risk of cargo loss is upon the company and no bill of lading is signed (*d*) that the company has the right to hire and discharge drivers independently of the lease agreement, (*e*) that the leases involved are for a 1-year term, (*f*) that the leased equipment is used to transport the company's property exclusively, (*g*) that the company exercises exactly the same amount of control over drivers of leased tractors as drivers of company-owned tractors, and (*h*) that drivers of company-owned tractors, like the owner-operators, take their vehicles to and garage them at their homes, (6) that the examiner's findings and conclusions are not in accordance with the weight

of the evidence and applicable law, and (7) that, inasmuch as private carriage is involved, application of the national transportation policy to the situation here is contrary to law.

The Bureau argues in reply that the contention that this Commission is without jurisdiction over respondents' activities is predicated upon the assumption that the considered transportation is bona fide private carriage, when in fact the company's status, whether as shipper or private carrier, is the principal question at issue in this proceeding. The Bureau asserts that in an effort to protect itself against breaches of trust on the part of the drivers, the company has disassociated itself as much as possible from the actual operation of the leased vehicles and has assumed only such obligations of private carriage as would, in its opinion, give color and the form of legality to an otherwise unlawful operation. It argues further that the operations as conducted are inconsistent with a private carrier's status and that respondent owner-operators, in concert with the company, are shown to be engaged in a contract-carrier operation, for compensation, in interstate commerce, without authority.

The evidence adduced, the examiner's recommendations, the exceptions, and the reply thereto have been considered. Our discussion will be confined to those matters covered by the exceptions and reply, and the facts, so far as necessary for determination of the questions involved, are restated herein. All exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions, have nevertheless been considered and found not justified or it has been found that consideration thereof is unnecessary to a proper determination of the issues presented.

Exceptants' first contention is without merit. It is clearly within the scope of our powers and duties to determine whether the leased equipment is operated in private carriage or under leasing agreements which actually mask a for-hire operation conducted in violation of the act. Compare *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361, 366; and *Driver Service, Inc.—Investigation of Operations*, 77 M.C.C. 243. Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely, (1) is the transporation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire. Compare *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, hereinafter called the *Pacific Diesel Rental Co.* case. Both questions must be answered in the negative for us to conclude that the challenged operations are those of a bona fide private carrier.

In considering the primary question here in terms of who has the right to control, direct, and dominate the transportation performed, it is important to note the distinction between the situation wherein a person or persons other than the purported private carrier actually exercise control, direction, and dominance of the operation involved and the situation wherein such person or persons have any right to control, direct, and dominate the operation as actually conducted. We are here concerned with whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly per-

formed by it as private carriage. In *H. B. Church Truck Service Co. Com. Car. Application* 27 M.C.C. 191, hereinafter called the *Church* case, it was stated:

> in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of * * * controlling the transportation service,* as, for example, if the equipment were operated by the shipper's employee. [Italics added.]

The presumption, as noted above, refers to the lessor of equipment as the "carrier," but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier." Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper. Another way of stating the presumption would read: In cases in which the question of the status created by a lease of equipment with drivers by a person (or persons acting in concert) to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by such person (or persons) as a carrier for compensation; in other words that it is for-hire transportation and as such is subject to regulation.

In essence, respondents argue that this presumption has been overcome inasmuch as the company: (1) loads and dispatches the shipments, (2) pays the owner-operators a salary for driving, (3) makes the

usual payroll deductions, (4) has entered into a contract with the union with respect to employment of the owner-operators under which it has the power to hire and discharge them as drivers, (5) requires the equipment involved to be devoted to its exclusive use, and (6) exempts the owner-operators from all responsibility for any losses sustained by it with respect to company equipment, property, and cargo. All of these practices may tend or are designed to show that the owner-operators actually exercise little, if any, control, direction, and dominance over the considered operations, but they have little probative weight with respect to the question of whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly performed by it as private carriage.

In determining this question we must remember that the two significant instrumentalities of commerce with respect to motor carriage are (1) the equipment by which the transportation is accomplished and (2) the driver thereof. *Pacific Diesel Rental Co.* case, *supra*. Here each owner-operator supplies certain power units by which some transportation for the company is accomplished and his own services as driver are ordinarily utilized by the company in combination with his own power equipment. Determination of who exercises control over the considered operations is between the owner-operator who owns one significant instrumentality of commerce (the power equipment) and is himself the other significant instrumentality (the driver), on the one hand, and, on the other, the company which owns the commodities transported (and the trailer utilized) and which by agreement attempts to "assume" certain responsibilities for and control of the operation involved. On the facts presented in this proceeding, and bearing

in mind that the basic issue for determination is whether a private or for-hire operation is being performed, under the described arrangements, we do not find that the company in practice has achieved such exclusive control of both instrumentalities of transportation as will rebut the presumption that the operation is one of for hire. Even if each owner-operator should be considered to be a bona fide employee of the company with respect to his driving duties, he does not lose his status as an indepedent contractor with respect to the equipment, and his own services as a driver cannot be considered to take from him and give to the company such control as would overcome the presumption stated in the *Church* case, *supra*. The close relationship between the owner-operator's status as a supplier of equipment and as an "employee" of the company cannot reasonably be denied. There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists. We are satisfied that the company does not have the exclusive right and privilege of controlling the transportation service considered.

Considering the primary question here in terms of whether any person is engaged, in substance, in for-hire transportation we point out that the decision in *Fleming Common Carrier Application*, 8 M.C.C. 469, 470, noted:

> We conclude that the methods followed by applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

From this language it is implied that for-hire transportation can be accomplished by a carrier which provides (1) all of the equipment moving, (2) the power equipment only, or (3) none of the equipment moving.[4] Here we are concerned with whether each owner-operator is, in substance, engaged in for-hire (whether common or contract) transportation by the truckaway method providing power equipment only.

Section 203(a)(15) of the act defines a "contract carrier by motor vehicle" in terms of engaging for compensation, in (*a*) the furnishing of transportation services through the assignment of motor vehicles for a continuous period of time to the exclusive use of each person served or (*b*) the furnishing of transportation services designed to meet the distinct need of each individual customer. Inasmuch as the motor vehicle equipment of each owner-operator is exclusively devoted to the company, the type of for-hire operation with which the operation described here should be compared is that of a contract carrier by motor vehicle.

Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the company, furnishing a service designed to meet the distinct need of the company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip

[4] The provision of (1) or (2) is sometimes described as the truckaway method and the provision of (3) is sometimes described as the driveaway method.

expenses.* In short, the only points of possible difference between the service here provided and conventional contract-carrier services are, (1) the company prefers to separate the functions of the owner-operator regarding him, insofar as the equipment is concerned, as a lessor, and, insofar as his driving services are concerned, as a company employee, (2) the company bears the cost of personal and property liability insurance upon the leased equipment, (3) the company bears the cost of cargo insurance, and (4) the company exercises certain control over the owner-operators as "employees." In *R.N.G. Commercial Auto Renters, Inc., Contr. Car. Applic.*, 73 M.C.C. 665, hereinafter called the *R.N.G.* case the Commission found that assignment of the driver to the vehicle, supervision of them as to their duties, instruction of them as to the delivery of the merchandise, and requirement of them to report their deliveries and to file delivery tickets or receipts, by the shipper, are natural concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper. And, as stated in *Motor Haulage Co., Inc., Contract Carrier Application*, 46 M.C.C. 107, 117, there is no provision in part II of the act or in our rules and regulations thereunder which require that a contract carrier by motor vehicle shall provide protection for shipments moving on its vehicles. Further, in the *Pacific Diesel Rental Co.* case, *supra*, it was noted that in the last analysis a shipper's assumption of any of a carrier's responsibility to the public, in this day when such responsibilities readily can be passed on to insurers, is little more nor less

* In addition to the other costs which are set forth specifically here, there is in the case of each owner-operator a definite determinable deferred cost to the company to be paid the following year in the form of "vacation pay."

than a rate adjustment. Therefore (2), (3), and (4) above cannot be regarded as features of the service involved here which could distinguish it from contract-carrier service.

There remains the question of whether the company's separation of the functions of owner-operator is enough to change the basic character of the service performed by the owner-operator. In this connection the *Pacific Diesel Rental Co.*, case, *supra*, states:

> Pacific Diesel, alone, or in concert with one or more of the owner respondents, offers shipper respondents a service that differs essentially from conventional motor-carrier service only in that a particular shipper adopts and purports to employ the driver supplied for the duration of any transportation accomplished. In *Shields Extension of Operation—Alliance, Ohio*, 41 M.C.C. 100, the Commission, former division 5, found in a situation where applicant therein supplied equipment under lease accompanied, in some instances, by drivers who were paid by applicant and for whose service the shipper reimbursed applicant and, in other instances, by other drivers paid by shipper, that, in fact, such payment or reimbursement amounts to nothing more than additional compensation for applicant's service, supplementing the amount specified in the written contracts between applicant and shipper. Its conclusion was that such applicant's operations (somewhat comparable to those described herein) constitute carriage for hire subject to regulation under part II of the act. We are convinced here that, even if all the responsibilities of an employer with respect to the driver are assumed by a shipper, the service offered by Pacific Diesel, alone, or in concert with owner respondents, as appropriate, is, in substance, for-hire motor carriage subject to regulation under part II of the act. To hold otherwise would be inconsistent with

> the remedial purpose of part II and would be in contravention of our duty, imposed by Congress: (1) to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the act, (2) to foster sound economic conditions in transportation and among the several carriers, and (3) *to encourage reasonable charges* for the transportation service, *without* unjust discrimination, undue preferences or advantages, or *unfair or destructive competitive practices*. It is evident that were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress.

Actually, the basic difference between the facts in this case and those in that case is that the equipment owners there were acting in concert with Pacific Diesel Rental Co. Here, as there, we believe that it is evident that were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress. We are convinced that the owner-operator respondents here are, in substance, engaged in the business of interstate transportation of property on the public highways for-hire as contract carrier by motor vehicle.

In this record respondents make much of the fact that the company requires physicians' certificates, reports relative to the condition of the equipment utilized, and drivers' logs from the owner-operators. In *A A Auto Delivery, Inc., Common Carrier Application*, 77 M.C.C. 365, a similar point was considered, and it was said:

> In determining questions directed to the ascertainment of the identity of the one actually conducting a transportation operation, whether it be a carrier, a shipper, or other individual, we have consistently looked to the one who exercises or can exercise control and domination over such operation. In certain cases, where there exists the possibility of evasion of the act through subterfuge and the elements of direction, control, and domination appear to compel the conclusion that the transportation operations involved constitute private carriage by a shipper, we have also looked to the question of who is responsible to the public. In such cases we recognize that any responsibility as a carrier retained, by a lessor of equipment or a supplier of drivers, for the operation of the vehicle, the action of the operators thereof, or the safe delivery of cargoes is inconsistent with such private carriage by the shipper and that the shipper must accept complete responsibility for the entire operation. Compare *Scott Bros., Inc., Contract Carrier Application*, 32 M.C.C. 253. In instances, however, where, as here, one party holds out a transportation service which it accomplishes under its own direction and control whether by or through its agents or employees, responsibility to the public (including the shipper) for such service must be accepted by the party holding out and performing the service and any understanding or misunderstanding to the contrary by those concerned can be in no way determinative as to

the identity of who is actually conducting the considered transportation operations.

Although the company's requirements here tend to show that it, in good faith, is attempting to have the described arrangements conform to the practices of true private carriage and to abide by our safety regulation, such attempts are not determinative of whether the operations involved constitute private or for-hire carriage. Rather, the meeting of safety requirements is a duty which falls upon the actual carrier, whether private or for-hire, and the proper person to fulfill the safety requirements is a question secondary to determination of which person, in fact, is the carrier in the particular circumstances considered.

In summary, basically we have here a situation wherein a motor-carrier service is being performed through and by the use of owner-operators whose business is the performance of transportation for compensation. Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for hire; but once the owner-operators enter into the compehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part. No longer then are they merely unengaged persons; rather they become actively and primarily engaged in motor-carrier services wherein they supply all the significant facilities for, and play the dominant role in, the provision of the actual transportation performed. In other words the company provides the traffic and the owner-operators provide the transportation for which they are compensated as carriers and not as bona fide members of the company's organization.

In view of our conclusion that the owner-operators are engaged in for-hire carriage, the question remains as to whether the company has, in concert with the owner-operators, participated in their operations to a sufficient extent that it can be found to have participated in the violations of the act. We believe that the record is convincing that, though the efforts of the company appear to have been directed to the accomplishment of private carriage partially exempt from regulation, it planned and fostered the method of operation of the for-hire carriers, relieved them of certain of the burdens of their for-hire transportation services, and otherwise participated in their violation of the act. A cease and desist order will be directed to the owner-operator respondents who are actually operating as for-hire carriers. It is noted, however, that the circumstances here are such that the described operations would not constitute a bar to our finding the owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy. Inasmuch as the cease and desist order directed to the owner-operators should result in discontinuance of the unlawful practices involved, it is deemed unnecessary at this time to direct any order to the company.

We find that Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn, and William M. Martin, severally, have been and are engaged in transportation of property, in interstate commerce for compensation, as contract carriers by motor vehicle, without appropriate authority, in violation of section 209(a)(1) of the Interstate Commerce Act.

An order will be entered (1) requiring respondents named in the preceding paragraph to cease and desist forthwith, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and (2) discontinuing the proceeding as to all other respondents.

COMMISSIONER WEBB, dissenting:

I am, and the respondents will be, puzzled by the rationale of the report in this proceeding. Archie Norris, Todd Shinn, and the other respondent owner-operators will be astonished to learn that they are contract carriers and not employees of the Oklahoma Furniture Manufacturing Co. Interspersed throughout the report are references to 15 indicia of private carriage not one of which is present in the typical contract carriage operation. The Oklahoma Furniture Manufacturing Co. (1) pays the owner-operators for driving; (2) deducts from their paychecks social security and Federal income taxes; (3) provides workmen's compensation benefits; (4) retains the right to hire and discharge drivers independently of the lease arrangement; (5) bargains with a labor union respecting the wages of owner-operators and other conditions of employment; (6) provides the trailer; (7) has exclusive control over the use of all transportation equipment; (8) assumes full responsibility for maintaining such equipment in first-class operating condition; (9) takes full responsibility for damage to cargo; (10) loads and dispatches the shipments; (11) issues detailed routing instructions; (12) issues no bill of lading; (13) keeps drivers' logs and medical certificates; (14) pays for public liability and property damage insurance, and (15) expressly

reverses to itself the exclusive right to control and direct the transportation service involved. It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents.

The report lays down the following two tests:

> Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely; (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire.

As I see it, the second test indicated for determining whether a for-hire operation is conducted by a lessor is whether or not the lessor is engaged in interstate transportation on the public highways for hire. The report thus appears to conclude by *ipse dixit* that respondents are violators of the Interstate Commerce Act. Further, the report in referring to the *Church* case, *supra*, and the rebuttable presumption of for-hire transportation which arises from a lease of equipment with drivers by a carrier to a shipper, has this to say:

> The presumption, as noted above, refers to the lessor of equipment as the "carrier," but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier." Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or per-

> sons other than the purported private carrier leases equipment with drivers to a shipper.

The meaning of the statement just quoted is far from clear. In any event, all the ambiguities in the report are dispelled and the indicia of bona fide private carriage are swept aside by one statement of exceptional clarity:

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.

No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary. The report, while holding up the single element of "status" as the conclusive factor in determining who has the right to control and direct, is inconsistent in citing the *Church* case, *supra*, and the *R.N.G.* case, *supra*. The latter case contains the following statement:

> The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between applicant [lessor] and Gaylord [lessee], including particularly the actual practices in the conduct of the operation. No one element or circumstance is by itself conclusive. See *H. B. Church Truck Service Co. Com. Car. Application, 27 M.C.C. 191.*

In addition to its ominous implications, the report contains a few that are anomalous. For example, if Norris drives Shinn's tractor and Shinn drives Norris', both would probably be held to be engaged in private carriage. And this would be true even though all other aspects of the transportation service were identical to the arrangements condemned in this proceeding. Also, if a company driver owning no equipment drives Shinn's tractor and Shinn drives a company tractor, neither would be regarded as performing a for-hire service.

The report recognizes the harshness of its ultimate conclusion. Respondents are invited to apply for contract-carrier authority and are informed that the operations interdicted by the report will not preclude a finding of fitness. If the respondents construe this as any implied promise to grant contract-carrier authority they may be disappointed. Contract-carrier application proceedings must also consider an applicant's financial fitness and the factor of existing motor-carrier service.

At the core of this decision is the false assumption that Archie Norris and Todd Shinn and the other respondents lease equipment with drivers to the shipper. They do no such thing. They offer their own services as employees and receive additional compensation because they themselves supply an expensive tool. This kind of employer-employee arrangement was far more common a century ago, but it has by no means disappeared from the contemporary economic scene. The cases cited in the report in support of the cease and desist order involved a person or firm who employed drivers, who owned equipment, and who made both available to the shipper or carrier, often under some subterfuge arrangement. Respondents here own equipment, do

not employ drivers, make equipment available to the furniture company, and offer their services as employees of the company.

I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation. The impact of this decision on the Oklahoma Furniture Manufacturing Co. is negligible. It can buy respondents' tractors or it can rent tractors from a truck rental firm and pay respondents $50 a week plus 2 cents a mile for driving instead of 5 to 6 cents a mile for driving their own tractors and 10 to 14 cents per mile rental.

If, as I imagine, there is a fairly high turnover of owner-operators serving a particular shipper or carrier, it is conceivable that thousands of applications would be filed with the Commission as a result of nationwide application of the novel rule of law enunciated in the report. However, this possible administrative nightmare is considerably less important than the unwitting, but nevertheless devastating blow which this report delivers to the property rights of numerous small entrepreneurs, as no doubt the tractors of many of the owner-operators involved in this proceeding were purchased at a considerable financial sacrifice. I am unable to find any justification for such a result either within the broad framework of the national transportation policy or within the interstices of part II of the Interstate Commerce Act. Therefore, I cannot impose upon respondents here and others in a similar position what appears to me to be a legally unsupportable sentence of economic excommunication.

I would discontinue the proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 623

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

HENRY E. DRUM, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. ----------.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Appellants,

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HENRY E. DRUM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM.

STATEMENT.

Weather-Seal, Inc., intervening petitioner, files the following motion pursuant to Rule 16 and its brief in support of both its motion and in opposition to the request for review by the appellants.

MOTION.

Weather-Seal, Inc., pursuant to Rule 16, hereby moves that this Court enter an order affirming the order of the United States District Court for the Western District of Oklahoma entered in the within matter, or in the alternative, to dismiss the within appeal for the reasons that there are no substantial questions requiring further argument. The decision of the District Court properly states

the established law applicable to the issues presented and the questions presented in the jurisdictional statements by appellants are not the issues presented to and decided by the Interstate Commerce Commission, nor presented to or decided by the District Court.

QUESTION.

The instant proceeding, in the words of the Interstate Commerce Commission investigator who testified before the hearing before that Board (Record 93), stated, "* * * on account of some of the road inspections that we made had indicated that the owner was also driving his own equipment." In the same hearing, counsel for the Commission stipulated that the only issue before the Interstate Commerce Commission was one of control over the operations by the Oklahoma Furniture Manufacturing Company (Record 87-88).

The Commission, in their majority opinion (page 54 of the government's jurisdictional statement) stated,

> "Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for hire; but once the owner-operators enter into the comprehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part."

In his dissenting opinion, Commissioner Webb, in calling attention to this element in the case noted (page 58 of the government's jurisdictional statement):

> "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private

> carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary. * * *"

The District Court recognized that the issue of control was the prime question considered by the Interstate Commerce Commission and was therefore the principal question decided by that court. The court's statement, which appears at page 29 of the government's jurisdictional statement, summed up the issue as follows:

> "The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the *Church* case. * * *"

It is therefore clear, as was pointed out by Commissioner Webb in his dissenting opinion (page 59 of the government's jurisdictional statement), that if employee A drives equipment leased to the employer by employee B and if employee B drives the equipment leased to the employer by employee A, the Interstate Commerce Commission under its decision would consider the arrangement lawful and proper. The Commission would consider it illegal only when employee A drives employee A's truck, and when employee B drives employee B's truck—everything else being identical.

The question which is presented in this appeal can be stated as follows: Can a simple, unsophisticated truck driver, trying to earn more than a daily wage for his family, enter into a lease for his truck, upon the best terms available, and enter into a separate contract of employment to drive it or some other truck for the same employer, both of which agreements are individually lawful and proper and free of subterfuge?

All of the appellants' statements in their jurisdictional statement, based upon the financial result, are made for the sole purpose of covering up this real issue in the hope of making a simple issue so complicated that this Court will feel that there is a serious question of great import involved.

ARGUMENT.

Commissioner Webb, who unquestionably sat with the majority commissioners in their deliberations in this case, in his dissenting opinion, very clearly cut through the official language of the majority opinion and stated the real basis for the opinion when he wrote the following:

> "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation." (page 60, government's jurisdictional statement.)

There can be no other reason for the Commission to find as they did since they also found that (1) there was no attempt at subterfuge; (2) the lease agreements, standing by themselves were proper; and (3) the employment contracts, standing alone, were also proper. Nevertheless, they proceeded from these three premises to find that when a lessor-driver drives his own truck it is illegal.

Without pointing to all of the fallacies in the majority opinion, it should suffice to illustrate the point to urge the Court to turn to pages 50 and 51 of the government's jurisdictional statement, wherein the Interstate Commerce Commission discussed the responsibility for damage to cargo being transported on the leased equipment. There

was no question that under the lease agreement the Oklahoma Furniture Manufacturing Company was responsible for any loss or damage to the cargo transported by its employees. This responsibility for cargo loss is an important criteria in determining whether or not there is a genuine private carriage being conducted, since, obviously, any private carrier is responsible for its own merchandise which it is handling. In any investgation such as the Commission was carrying on it is proper that the Commission should seek out any devious means for shifting this responsibility onto the owner or driver of the equipment. In this case the Commission could find no skulduggery; but, rather than treat that as evidence that the arrangement was proper, it proceeded to twist this fact into an additional basis for holding that the arrangement was illegal by stating that "in this day when such responsibilities readily can be passed on to insurers, (it) is little more nor less than a rate adjustment." (page 50, government's jurisdictional statement.)

The Court will note in its examination of the Commission's full opinion that, as in the example relative to cargo insurance, every indicia of legality was twisted into something improper and the only fact upon which the Commission based its decision was that generally each employee drove the truck which he had leased to the company. The majority, in their zeal to solicit business for a common or contract carrier, overlooked the clear mandate of the Congress as declared in the Transportation Act of 1940, as reported in *Taylor vs. Interstate Commerce Commission*, 209 Fed. 2d 353:

> "The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a weasel word in

this connection. The policy of the Act declares as follows:

> 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each;* * * *' (Emphasis supplied.) Transportation Act of 1940, Par. 1, 54 Stat. 899, 49 U. S. C. A. note preceding section 301.

"One of the modes of transportation subject to the Act, as having 'inherent advantages' is that by private carriers of their own property. This is stated in 303(17) as follows:

> '(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in the furtherance of any commercial enterprise.'

"We think that in interpreting this paragraph and paragraph (15) providing for 'contract carriers' later considered, there is no rule of interpretation more liberal for one than the other."

See also *Brooks Transportation Company, et al. vs. United States,* 93 F. S. 517, Aff. 340 U. S. 925, 95 Law Ed. 668, and *Interstate Commerce Commission vs. Woodall Food Products Co., Inc.,* 112 F. S. 639, Aff. 207 Fed. 2d 517.

Examination of both the majority opinion of the Interstate Commerce Commission, the minority opinion by Commissioner Webb, and the opinion of the District Court conclusively discloses that every indicia of a lawful, legiti-

mate private carriage existed. The majority, in their desire to protect common and contract carriers, refused to give any weight to the evidence of legitimacy; but, on the contrary, drew unwarranted inferences therefrom.

There is no basis in law for this discrimination against private carriers. On the contrary, Congress has recognized them as carriers, has decreed that insofar as safety of operations is concerned they shall be regulated by the Interstate Commerce Commission, and they should therefore receive the equal protection and supervision accorded to common and contract carriers.

The great emphasis in the jurisdictional statements filed with this Court emphasizes that the Oklahoma Furniture Manufacturing Company has leased equipment at a fixed price and has hired drivers at a fixed mileage rate. The conclusion is drawn from this that no one should be permitted to fix their cost of transportation without employing a contract or common carrier. This is specious reasoning. On the one hand, the appellants refused to properly recognize those costs that were not fixed—responsibility for loss to cargo, vacation pay for the drivers, the costs and expenses of payroll deductions for the employees, Workmen's Compensation, the risks of increases caused by renegotiation of leases, the risks of increases in drivers' earnings due to negotiations with the union which bargains for them, the costs to the Oklahoma Furniture Manufacturing Company in owning its own trailers, the hidden cost of supervising the drivers and the equipment, the cost of loading the trailers, the cost of compliance with the Interstate Commerce Commission's safety regulations, which admittedly they complied with, the payment of public liability and property damage insurance, as well as many others. None of these items were in dispute. On the other hand, the Commission decided, and presumably the appel-

lants agree, that it is proper for a private carrier to lease motor freight equipment since they agree that the leases involved in this case were proper but for the fact that lessors drove the equipment. The majority and the appellants further agree that the employment of drivers on a mileage basis was proper since they agreed that the employment contract was lawful but for the fact that the drivers on occasion drove their own vehicles. Thus, without the need for citation of authority, it is clear that there is nothing abhorrent in a manufacturing company attempting to fix and control its costs.

It is therefore evident that the fixing of costs is not a real issue over which this Court should be called upon to decide.

It should also be noted that on page 7 of the government's statement the following appears: "* * * the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control." We are now in a situation where a case which commenced for the sole purpose of testing control has been moved around in the minds of the appellants so that control is no longer an issue.

Much ado was made in the government's brief relative to a study entitled, "Gray Area of Transportation Operations." From the references made to it in the appellants' brief it is clear that this is an unofficial, apparently biased study made by the Interstate Commerce Commission in an effort to influence legislative action by the Congress of the United States. This study was not presented in evidence, nor was it mentioned, let alone considered, by either the Commission or by the District Court. It is fairly obvious that Congress did not receive it favorably since no legislative action was taken by reason of it. Arguments based upon this study should not be considered.

This Court has regularly held that arguments not presented to or decided by the lower courts would not be considered by this Court. *Delgadillo vs. Carmichael*, 332 U. S. 388, 92 Law Ed. 17; *McGrath vs. Manufacturers Trust Co.*, 378 U. S. 241, 94 Law Ed. 31.

CONCLUSION.

It is therefore respectfully submitted that the decision of the District Court for the Western District of Oklahoma should be affirmed, or in the alternative, that the within appeal should be dismissed for the reasons that there is no substantial question involved requiring further argument, that the principal issues presented by the appellants in the jurisdictional statement were not presented to nor considered by the lower court or the Interstate Commerce Commission.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. ~~609~~ 23

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,
VERSUS
HENRY E. DRUM, ET AL.,
Appellees.

No. ~~609~~ 24

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,
VERSUS
HENRY E. DRUM, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM

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February, 1961.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 608

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

VERSUS

HENRY E. DRUM, ET AL.,
Appellees.

No. 609

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

VERSUS

HENRY E. DRUM, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM

Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene

Wiggins, Charles McGee, Tod Shinn, and Oklahoma Furniture Manufacturing Company, a corporation, file this motion under Rule 16 with their brief and in opposition to the request for review by the appellants.

MOTION

Appellees, Henry E. Drum, *et al.*, pursuant to Rule 16, move the Court to enter an order affirming the judgment of the United States District Court for the Western District of Oklahoma entered herein, or in the alternative, to dismiss the appeal for the reasons that it is manifest that the questions on which the decision of the cause depends are so insubstantial as to not need further argument, and the questions presented by appellants were not presented to or decided by the Interstate Commerce Commission or the District Court.

STATEMENT OF CASE

This is a direct appeal from a unanimous decision of a three-judge District Court vacating, setting aside and annulling a cease and desist order issued by the Interstate Commerce Commission (Commission). The opinion of the United States District Court for the Western District of Oklahoma is not yet officially reported. It appears as Appendix A to the Jurisdictional Statement of appellants in Case No. 608.

The District Court action was brought by appellees under 28 U.S.C.A. 1336, 1398 and 2321-2325, attacking the order of the Commission (Division 1) of April 22, 1959, in No. MC-C-2143, *Oklahoma Furniture Manufacturing Co.*,

et al., Investigation of Operations, 79 M.C.C. 403. The report of the Commission also appears in appellants' Jurisdictional Statement, Case No. 608, as Exhibit B.

The basic facts and circumstances of the operation in question have never been in dispute. Detailed statements of these facts as found by the District Court and Commission appear in Appendices A and B, respectively, appellants' Jurisdictional Statement. Briefly put, Oklahoma Furniture Manufacturing Company, a corporation (Oklahoma), is primarily engaged in manufacturing low-cost furniture which it transports in interstate commerce to its customers. Oklahoma utilizes seventeen trailers, seventeen tractors and two bobtails (for use at plant in Guthrie, Oklahoma, only) in the transportation operation. Oklahoma owns all of this equipment with the exception of eleven tractors which it leases from the individual appellees. The individual appellees are employed by Oklahoma under the terms of a contract with a union. These employees customarily drive their own tractors, but may be and sometimes are reassigned at the will of Oklahoma.

The Commission investigation was commenced under 49 U.S.C.A. 304(c)[1] to determine whether the drivers were

---

[1] "(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

engaged in transportation for-hire, Oklahoma aiding and abetting in the violation of the Motor Carrier Act. The Commission found that part of Oklahoma's operation conducted by Oklahoma trailers, leased trucks and "owner-operators" to be transportation for-hire (contract carriage). Oklahoma's operation by owned tractors, trailers and driven by persons not owner-operators was held to be private carriage. The District Court held the entire operation to be private carriage.

It would be difficult for an attorney to urge the unimportance of a case involving the livelihood of his clients, in issue more than three years, and now before this High Court. We make no attempt to do so.

We do urge that the Commission erred in its decision, the District Court corrected this error under correct law, and appellants' contentions lack merit to the extent that the question presented to this Court is insubstantial.

THE INTERSTATE COMMERCE COMMISSION COMMITTED ERRORS OF LAW. THE ORDER WAS NOT BASED ON SUBSTANTIAL EVIDENCE.

Appellants, United States and the Commission, represent the scope of this appeal as follows:

> "This appeal goes only to the question whether, as the district court thought, the control exercised by Oklahoma over the operations is determinative or whether, as the Commission alternatively held, the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control" (Jurisdictional Statement, page 7).

The term "control" is not defined in the Jurisdictional Statement but is described as something "that may readily be shifted to suit the parties' convenience" (id 7) and a "single element" (id 13). "Control" as used in the Commission report and as used in the District Court opinion are different species, neither of which possesses these simple attributes.

The "control test" is a concept created by the Commission.[2] It has been used in many Commission decisions.[3] It has also been approved or used by the courts.[4] A clear statement of this test appears in the decision of *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, at 195 and 196:

> "With reference to the leased-truck operations, the first question presented is whether the operation is that of applicant, as the performance of transportation for hire, or whether it is private carriage, performed by the shipper. The line of distinction between the two is not always clear. Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains

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[2] *United States* v. *Thompson*, 321 U.S. 19, 88 L. Ed. 513, 64 Sup. Ct. 392.

[3] *Watson Mfg. Co., Inc., Common Carrier Application*, 51 M.C.C. 223 (1949); *John J. Casale, Inc., Contract Carrier Application*, 44 M.C.C. 45 (1944); *Shields Extension of Operations-Alliance, Ohio*, 41 M.C.C. 100 (1942); *H. B. Church Truck Service Co., Common Carrier Application;* 27 M.C.C. 191 (1940); *C. E. Hall & Sons, Inc., Contract Carrier Application*, 24 M.C.C. 33 (1940); *N. E. Rosenblum Truck Lines, Inc., Contract Carrier Application*, 24 M.C.C. 121 (1940); *Dixie Ohio Exp. Co., Common Carrier Application*, 17 M.C.C. 735 (1939).

[4] *Interstate Commerce Commission* v. *Gamnoe*, 100 F. Supp. 790 (1951); *Interstate Commerce Commission* v. *Cheesbrough*, 77 F. Supp. 441 (1948); *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (1947), *aff'd*, 331 U.S. 784, 67 Sup. Ct. 1205.

in the carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation except to the limited extent provided in section 204(a)(3). The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No one element of such facts and circumstances is by itself conclusive."

We point out that this test uses the word "control" to indicate the identity of the one furnishing a transportation service. Control is that conclusion drawn from the facts and circumstances surrounding the transaction and the actual practices, no one of which is by itself controlling. This type of control is neither a single element nor readily shifted.

In the case at bar the Commission did not apply the control test as set out in the *H. B. Church* case, *supra*. The determination of status was said to rest upon the answers to two questions, both of which must be answered in the negative before there could be private carriage not subject to regulation. Those questions are:

"* * * Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely, (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire * * *" (Jurisdictional Statement, page 45).

In discussing question number one, the Commission distinguished between "exclusive right to control" and "actual control," (Jurisdictional Statement, page 45). The Commission plainly stated that it was concerned only with the exclusive right to control in answering the first question.[5] At this point the Commission invoked the presumption of transportation for hire set out in the *H. B. Church* case, *supra*:

> "* * * In *H. B. Church Truck Service Co. Com. Car. Application* 27 M.C.C. 191, hereinafter called the *Church* case, it was stated:
>
> > 'in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of * * * controlling the transportation service*, as, for example, if the equipment were operated by the shipper's employee. (Italics added)' * * *" (Jurisdictional Statement, page 46).

The Commission then enumerated six elements of control actually exercised by Oklahoma to the exclusion of the

---

[5] Each of the leases provides that Oklahoma "shall have sole control, right of direction, and use of the leased equipment" (*Jurisdictional Statement*, page 21). Oklahoma also has the right to fire the drivers independently of the leased equipment (*Jurisdictional Statement*, page 24).

drivers. These proven and acknowledged elements of control were disregarded:

> "* * * All of these practices may tend or are designed to show that the owner-operators actually exercise little, if any, control, direction, and dominance over the considered operations, but they have little probative weight with respect to the question of whether the company has the *exclusive right* to control, direct, dominate the transportation purportedly performed by it as private carriage * * *" (Jurisdictional Statement, page 47).

In the paragraph that follows the above quotation, the Commission held the presumption was not rebutted nor could it be.

> "* * * There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists * * *" (Jurisdictional Statement, page 48).

This reasoning by the Commission was condemned by the District Court as repudiating the *H. B. Church* case and making the presumption irrebuttable (Jurisdictional Statement, page 29). In requiring the respondents to prove that Oklahoma had every known and imagined right to control, the Commission cast an impossible burden upon respondents. We also point out that the Commission did not name or identify what right to control was left outstanding nor did it define what is entailed in "exclusive right to control."

The District Court provided an alternative distinct from misuse of the presumption by the Commission. The alternative was that the presumption of the *H. B. Church* case, *supra*, was not applicable; the Commission had formulated a new presumption. In stating this alternative the Court was lenient with the Commission. The Commission report says:

> "* * * The presumption, as noted above, refers to the lessor of equipment as the 'carrier,' but it is clear that the presumption does not depend upon a prior determination that the 'lessor' is a 'carrier.' Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper * * *" (Jurisdictional Statement, page 46).

The above quotation should be compared with the following quotation from the decision *John J. Casale, Inc., Contract Carrier Application*, MC-20,314, 44 M.C.C. 45, which was not called to the attention of the District Court (Referring to the *H. B. Church Co.* decision):

> "It was also pointed out that the 'lease' by a motor carrier of equipment with drivers to a shipper raises a presumption that the resulting operation is that of the carrier; however, such presumption will yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service.
>
> "We are not unmindful of the fact that such presumption arises only in those instances where a *motor carrier* furnishes equipment with drivers to a shipper under an arrangement such as described. In other

words the one furnishing the equipment must have acquired the status of a motor carrier at the time the so-called leases were negotiated. Applicant admittedly was a motor carrier as to part of its operations on the critical date and for several years thereafter . . ."

THE DISTRICT COURT PROPERLY CORRECTED THE COMMISSION ERRORS

The Commission expressly held through the use of a presumption that Oklahoma did not have the "exclusive right to control." Appellants argued orally and in brief to the District Court that Oklahoma did not have "control." The District Court discussed the Commission's ruling and appellants' contentions concerning control. Appellants have now disassociated themselves from control which they argue to be immaterial. Appellants further argue that the District Court considered nothing but control; and hence, committed error.

Appellants' contentions misconstrue the opinion. The District Court clearly sets out the issue to be determined:

> "The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F.2d 358, put it, 'Simply stated it is who was transporting the goods in question,' that is, whose operations in interstate transportation were these, those of the Company or those of the owner-operators?" (Jurisdictional Statement, page 24).

The decision on this issue is likewise clearly stated:

> "As is urged by defendants, substance, not form, should be the governing factor in determining whether these operations constituted transportation for-hire on the part of the owner-operators. *United States* v. *La Tuff Transfer Service, supra; Georgia Truck System, Inc.* v. *Interstate Commerce Commission, supra.* In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators. The Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. The change in form alone did not change the substance of the Company's operations. The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles" (Jurisdictional Statement, pages 30, 31).

The issue for determination under the District Court opinion is the identity of the person furnishing a transportation service. The issue under the Commission's "control" test as set out in the *H. B. Church* decision is the same. Both approaches look at all the facts and circumstances of the transaction to determine the substance of the arrangement.

The two questions asked by the Commission in this case will also operate to fix the identity of the one providing the transportation service. However, the questions must be answered in a straight forward manner, without

presumptions, without casting an impossible burden of proof on the respondent to the investigation, and by a fair evaluation of the evidence.

The District Court opinion does not condemn the Commission's tests; it insists that these tests be correctly applied.

THE APPELLANTS PROPOSE AN INSUBSTANTIAL QUESTION

Because all of the facts and circumstances of the transaction were weighed by District Court, it necessarily follows that the "financial risks and burdens" test proposed by appellants is a part of the whole. This concept was not mentioned or argued to the District Court. It was not expressed by the Commission in its decision. It is significant that no Federal Court opinion has ever used it as the question to be answered. It is a reversal of the former Commission decision in *Watson Manufacturing Co., Inc., Common Carrier Application*, 51 M.C.C. 223.

Appellants cite three cases which they contend support this proposition[6] (Jurisdictional Statement, page 15). Each of these cases uses the same test:

> "(1) In the court and Commission cases the issue of whether a carrier status subject to regulation on the part of the lessor existed has been determined by how much service which goes with ordinary hauling for

---

[6] *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn.).

compensation was being furnished the shipper in addition to the leased vehicle. Also whether on the whole the dealings and arrangements between the parties indicate that a transportation service was being rendered by the lessor to the lessee rather than simply furnishing for private operation a vehicle to a shipper, and whether the vehicle was being operated by the shipper in the same manner as would normally obtain if he were the owner of the rented equipment." *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13, at page 19.

The quoted test determines the identity of the one providing a transportation service by determining how much service the lessor provides and whether on the whole it amounts to a transportation service.

The three cases cited by appellants each involve subterfuge. No subterfuge is involved in this case and appellants have never so contended. The facts of the cited cases vitally differ from the facts of the case at bar. In the *F. & F. Truck Leasing Co.* case, *supra*, the Court pointed out at 78 F. Supp. 19, paragraph (2), seven essential facts which established that the lessor was a motor carrier. In the following paragraph, the Court pointed out three additional facts establishing the motor carrier status of the lessor. Not one of those ten enumerated facts is present in the case at bar. Examination of those ten important points in relation to the present facts can produce only one conclusion: That Oklahoma is providing a transportation service to itself.

Appellants assert that the individual appellees are in the business of providing a transportation service for compensation. The case of *Local 24 of I. B. of T., C., W. & H. of*

America v. *Oliver, et al.*, 358 U.S. 283, 3 L. Ed. 312, 79 Sup. Ct. 279, held that persons such as appellees are employees. The terms of their employment and lease of equipment were subject to union contract. Appellants would have Oklahoma in the anomalous position of negotiating with the employees' union for the price of *contract carriage.*

The Commission is attempting to prohibit in private carriage what it allows with regulation in common and contract carriage. See *American Trucking Association* v. *United States*, 344 U.S. 298, 97 L. Ed. 337, 73 Sup. Ct. 307. In the case at bar, the "owner-operators" are more thoroughly integrated in Oklahoma than required by Commission rules governing motor carriers.

A financial risk and burdens test asked for by appellants would produce doubt on settled law. It has been established that rental of equipment, the lessor providing maintenance, oil, and gas does not constitute transportation for hire. *Motor Haulage Co., Inc.* v. *United States, et al.*, 70 F. Supp. 17, *affirmed*, 331 U.S. 784, 91 L. Ed. 1815, 67 Sup. Ct. 1205; *U-Drive It Company* v. *Pennsylvania Inc., Common Carrier Application*, 23 M.C.C. 799.

The substance of appellant's proposed test has been rejected in determining whether an "owner-operator" is providing transportation for hire. *Earle* v. *Babler*, 180 F.2d 1016.

Before the Commission's hearing officer, counsel for the Commission gave appellees to understand that the need for this particular type of operation was immaterial to the question of its legality. The needs of common and contract

carriers are likewise immaterial to the legality of this operation.

Appellants cite and quote from *Gray Area of Transportation Operations*, a study of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, June 1960. District Court trial of this case was on June 15, 1960. That study was not presented to the court as either evidence or authority. The preface states that the study was prepared for the Chairman of the Senate Committee on Interstate and Foreign Commerce. It is a self-serving declaration. It admits the conjectural and incomplete nature of its data throughout the study.

Another serious objection to this study is that at page 93 this case is cited as a gray area and illegal operation. This case is discussed but not named in the last paragraph of page 9, continuing to page 10. Moreover, on the cover page of *Gray Area of Transportation Operations* it states: "This study, issued as information, has not been adopted by the Interstate Commerce Commission." We object to having the evils of the entire industry placed on our shoulders.

Congress has expressed the National Transportation Policy, *Historical Note, preceding*, 49 U.S.C.A. 301.

The National Transportation Policy states in part:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * *."

Appellants argue that private carriage must forever keep all of its inherent disadvantages while the Commission freely allows common and contract carriers to divest themselves of the inherent disadvantages of their respective modes of transportation. In the case at bar, Oklahoma has divested itself of the disadvantage of capital investment in the ownership of eleven tractors. These eleven tractors constitute only a part of the capital of this operation. The balance of the capital required in the operation is furnished by Oklahoma. In addition to the heavy capital investment of Oklahoma in this operation, Oklahoma has retained the risk of loss for safe delivery of cargo, direction and supervision of the drivers, the loader, the routes, and responsibility to the public for negligence. The Commission in this decision at pages 48 and 49 of the Jurisdictional Statement cites the decision *Fleming Common Carrier Application*, 8 M.C.C. 469, as authority for the proposition that common and contract carriers need not own *any* of the equipment used in the operation. At pages 50 and 51 of the Jurisdictional Statement, the Commission sees no harm in allowing motor carriers to divest themselves of responsibility for safe delivery of cargo, direction and supervision of the drivers, and responsibility to the public for negligence. The Commission's position in the instant case is, therefore, opposed to the National Transportation Policy and does not provide "fair and impartial regulation of all modes of transportation subject to the provisions of this Act. So administered as to recognize and preserve the inherent advantages of each; * * *."

This operation is well summarized and defined in the dissenting opinion of Commissioner Webb:

> "• • • Interspersed throughout the report are references to 15 indicia of private carriage not one of which is present in the typical contract carriage operation. The Oklahoma Furniture Manufacturing Co. (1) pays the owner-operators for driving; (2) deducts from their paychecks social security and Federal income taxes; (3) provides workmen's compensation benefits; (4) retains the right to hire and discharge drivers independently of the lease arrangement; (5) bargains with a labor union respecting the wages of owner-operators and other conditions of employment; (6) provides the trailer; (7) has exclusive control over the use of all transportation equipment; (8) assumes full responsibility for maintaining such equipment in first-class operating condition; (9) takes full responsibility for damage to cargo; (10) loads and dispatches the shipments; (11) issues detailed routing instructions; (12) issues no bill of lading; (13) keeps drivers' logs and medical certificates; (14) pays for public liability and property damage insurance, and (15) expressly reserves to itself the exclusive right to control and direct the transportation service involved. It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents" (Jurisdictional Statement, pages 56 and 57).

The appellant, Regular Common Carrier Conference of American Trucking Association, Inc., in Case No. 609, relies upon the case of *B & C Truck Leasing, Inc., et al.* v. *Interstate Commerce Commission*, 283 F.2d 163. The distinction between that case and the one at bar is so obvious that it is easily overlooked. In that case where is the private

carrier? There is none. No party to the case asserted that it was a private carrier. The persons who received the services of B & C Truck Leasing, Inc., and Ogden Drivers Service, Inc., were so devoid of any of the characteristics of private carriage that neither the majority opinion nor the minority opinion, diametrically opposed, raised the possibility.

Evidently, appellants desire that we defend the minority position of that case. Because private carriage was not an issue in that case, neither opinion is here material. The case at bar is not one of avoidance or evasion. Private carriers are included in the Motor Carrier Act and are regulated by the Commission as to safety of operation. We seek to be properly included, not completely disconnected. The issue in that case was whether two corporations could in concert furnish a transportation service and be neither common, contract nor *private carrier*.

The shippers in that case did nothing but ship. Every function performed by Oklahoma represents a distinction to the *B & C Truck Leasing, Inc.*, case. When fifteen or more impressive functions, which are indicia of private carriage, are recognized as being performed by Oklahoma, it is manifest that the distinction between the two cases is one of substance.

The *B & C Truck Leasing, Inc.*, case, *supra*, and the case at bar are not contradictory because each deals with a different question, under different facts. Both cases can stand in the Tenth Circuit.

SUMMARY

The Commission in its decision set up two questions for determining whether Oklahoma was a private carrier or the drivers of Oklahoma tractors were in the for-hire transportation business. The first question required that no person other than Oklahoma control the operation. Control in other persons was presumed and the burden of supplying evidence was cast upon the respondents to the investigation who are the appellees here. The respondents produced substantial evidence of control exercised by Oklahoma. The Commission, however, held that this evidence of actual control was immaterial. According to the Commission, the presumption required Oklahoma to prove its "exclusive right to control."

The District Court properly held that the Commission had both repudiated the decision from which it took the presumption and had made the presumption irrebuttable. After disapproving of the Commission's use of the presumption, the District Court found that the substance of the arrangement revealed that Oklahoma was providing a transportation service to itself as a private carrier. The determination of private carriage is not a novel question of law and the District Court followed established precedent.

The appellants now assert that the District Court exclusively used a control test. The written opinion of the District Court is its own evidence to the contrary. Appellants propose a test which was not proposed to the District Court. This test is merely an attempt to stress certain facts less than the entire operation, which facts appellants

feel are more favorable to them. The District Court considered all of the facts, which are detailed in that Court's opinion.

As between three types of carriage by motor vehicle which Congress created, no type is entitled to a more liberal definition than the other. Questions of siphoning off traffic from common and contract carriers is secondary. Before the siphoning off, if any, is condemned, it must first be established that Oklahoma is not a private carrier.

The question presented by appellants is insubstantial and the appeal should be dismissed or affirmed.

Respectfully submitted,

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Attorneys for Appellees,
Henry E. Drum, et al.

February, 1961.

CERTIFICATE OF SERVICE

I, Walter D. Hanson, attorney for the appellees, Henry E. Drum, *et al.*, and a member of the bar of the Supreme Court of the United States, hereby state that on the 14th day of February, 1961, I served copies of the foregoing Motion to Dismiss the Appeal, or in the Alternative, a Motion to Affirm, on the several parties as follows:

1. On the United States, by mailing copies, air mail, duly addressed and postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Assistant Attorney General, Department of Justice, Washington 25, D. C., John J. Voortman and Richard A. Solomon, Attorneys, Department of Justice, Washington 25, D. C., and Paul W. Cress, United States Attorney, Oklahoma City, Oklahoma.

2. On the Interstate Commerce Commission, by mailing copies, air mail, duly addressed and postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and B. Franklin Taylor, Jr., Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Regular Common Carrier Conference of American Trucking Associations, Inc., appellant, by mailing copies, air mail, duly addressed and postage prepaid, to John S. Fessenden and Roland Rice, 618 Perpetual Building, 1111 E. Street, N. W., Washington 4, D. C.

4. On appellee, Weather-Seal, Inc., by mailing a copy, air mail, duly addressed and postage prepaid, to Charles R. Iden, Esquire, Attorney, 2200 First National Tower, Akron 8, Ohio.

WALTER D. HANSON,

Attorney for Henry E. Drum, *et al.*, Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 608

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

The question presented by this appeal is whether one who owns a truck tractor, drives it to pull the trailers of another and bears substantially all the risks of a profitable return on the time and capital invested, is a for-hire carrier as that term is used in the Interstate Commerce Act. It is appellants' contention that such carrier status exists even though the owner-operator may have surrendered to a shipper

every significant element of physical control. The importance of assigning to financial risk its proper weight as a critical indicium of "carriage" is discussed in the jurisdictional statement and need not be repeated here. However, appellees' motions to affirm assert that the government is now taking a position which was not adopted by the Commission in its report and order (J.S. 34-60) or placed before the district court (Weatherseal motion to affirm, p. 2, Drum motion to affirm, p. 12). This reply demonstrates the invalidity of that contention.

The Commission reached its determination that the owner-operators were carriers under two separate tests, whether they possessed the right to exercise any substantial control over the vehicles and whether, regardless of control, they engaged in substance in transportation for hire. Its holding under the second of these tests clearly embraces the issue presented in the jurisdictional statement. Thus, the Commission found that each owner-operator was a contract carrier because "He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses." (J.S. 49-50.)

Appellants' contention was likewise clearly before the district court. At pages 6 and 7 of the Government brief of May 1960 under the heading "Plaintiff

Owner-Operators Provide a Complete For-Hire Transportation Service" the following language appears:

> The two most essential elements of a transportation service are the actual physical moving of the freight and bearing the risk of loss or chance of gain on the investment of the time and equipment utilized in the transportation.
>
> It seems clear that the owner-operators here bear the risk of loss and have the chance of gain. They invest their time and money in buying, licensing, fueling, driving, and possibly insuring their tractors. This investment is subject to the uninsurable risks of the costly replacement and repair of parts, fluctuation in the price of gas, oil, licenses, and other operating expenses and the risk that the vehicle will not be utilized a substantial part of the time. The latter risk is particularly great under this purported lease, since the owner-operators promise to carry only Oklahoma Furniture's freight but Oklahoma Furniture does not promise to provide any freight. * * * It is the owner-operator who must keep the cost of these items below the price per mile which Oklahoma Furniture pays and who, if he does so, reaps the profit. The owner-operator renders, in effect, a transportation service at a fixed price per mile and thus assumes the responsibility for any ultimate profit or loss incurred in the transportation operation. * * *

A substantially similar argument was made in the brief of June 1, 1960 of Intervenor, Regular Common Carrier Conference of American Trucking Associa-

tion, Inc., the relevant portions of which are set out in the Appendix to this brief, pp. 5-7, *infra*.

It is clear, therefore, that the issue presented in this appeal was presented below. In view of its importance in the regulation of transportation, probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

MARCH 1961

APPENDIX

Brief of the Regular Common Carrier Conference of the American Trucking Association, Inc., filed in the district court on June 1, 1960, pp. 16-18 (footnotes omitted):

b. *Substance of arrangement is transportation for-hire.* The purported lease agreement provides that the owner of tractor equipment be compensated at a rate of 10 cents a mile for hauling a single axle trailer or 11 cents a mile for hauling a tandem axle trailer. The contract provides an additional 3 cents a mile for inbound hauls of raw materials because they are heavier loading than the Company's furniture products.

Under the contract the Owner-operator must pay all operating costs such as gas, oil, grease, parts, and license plates. The contract provides that the Company shall maintain equipment but this provision is inconsistent with the union contract which provides that Owner-operators shall pay for maintenance and repair of their own equipment. The record shows the actual fact is that the Owner-operators pay for maintenance, repair and upkeep of their equipment. The contract further provides that Company will not be responsible for damage to the equipment from any cause and if the Owner-operator carries collision, fire, theft or any other type of insurance it must be at his own expense. The Company does provide public liability and property damage insurance.

The purported "lease" states that Company shall have exclusive control, right of direction, and use of the equipment. Inasmuch as the Owner-operators garage the equipment, do not work every day, generally drive their own vehicles when they are used for the transportation of Company products, and use their vehicles for transportation between their homes

and Company's plant, it is obvious that the equipment is never in the possession of Company, and thus the provisions of the so-called "lease" relating to exclusive shipper use, etc., are nothing more than a paper form completely lacking in substance.

From the foregoing, it is clear that the Owner-operators assume all the substantial costs of providing a transportation service, including depreciation on their equipment, and that they must meet those costs, plus securing any profit, from the compensation received from Company. That compensation is made in two parts, one for the vehicle and one for the owner-driver's service, but both are based upon, measured by, and limited to one thing—the transportation actually performed.

Looking past the form of the arrangements—"lease agreements" and devices to lend color to asserted "employee" status of equipment owners, such as payment of social security and workmen's compensation —the facts lend themselves to the conclusion that in substance Company receives a complete transportation service from plaintiff Owner-operators. Certainly, it cannot be said that there is no warrant or no rational basis for such a conclusion. Moreover, the facts of the transportation operation as actually conducted lend strong support to the Commission's conclusion.

When an Owner-operator is to transport a load of Company's products, he is instructed as to routes and delivery points, and given a truck bill manifest. He then transports the traffic to destination, picks up a return load, if any, delivers that to Company and goes home. These elements, far from indicating that the transportation operation is that of Company, are but the normal incidents of any contract carrier service dedicated to a particular shipper.

From the evidence it is abundantly clear that plaintiff Owner-operators assume the economic risk of profit or loss to be derived from the transportation operations, thus relieving Company of the principal burden usually associated with the management of an operation. To conclude on these facts that the transportation of Company's products utilizing the equipment and service of plaintiff Owner-operators is transportation for-hire is manifestly a rational exercise of judgment. In consequence, the decision of the Interstate Commerce Commission should not be disturbed by this Court.

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Supreme Court of the United States

OCTOBER TERM, 1961

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant

v.

HENRY E. DRUM, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Oklahoma

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BRIEF FOR THE REGULAR COMMON CARRIER CONFERENCE

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In The

Supreme Court of the United States

October Term, 1961

No. 24

Regular Common Carrier Conference
Of American Trucking Associations, Inc.,
Appellant

v.

Henry E. Drum, et al.,
Appellees

On Appeal from the United States District Court for the Western District of Oklahoma

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BRIEF FOR THE REGULAR COMMON CARRIER CONFERENCE

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma (R. 13-24) was handed down on August 13, 1960, and is reported at 193 F. Supp. 275. The report and order of the Interstate Commerce Commission (R. 144-167) is reported at 79 M.C.C. 403.

JURISDICTION

The judgment of the District Court (R. 25) was entered on August 13, 1960, and notice of appeal was filed in that

Court by the Regular Common Carrier Conference of the American Trucking Associations, Inc. (R. 29-30), on October 12, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *American Trucking Assns.* v. *Frisco Transp. Co.*, 358 U. S. 133 (1958); *Minneapolis & St. L. R. Co.* v. *United States*, 361 U. S. 173 (1959); *Florida Lime & Avocado Growers* v. *Jacobson*, 362 U. S. 73 (1960); and *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960). Probable jurisdiction was noted March 20, 1961.

STATUTE INVOLVED

The statute involved in this case is the Interstate Commerce Act, 49 U.S.C. § 1 et seq. The relevant sections of that Act are set forth verbatim in the appendix attached hereto and include:

The National Transportation Policy, 49 U.S.C. preceding § 1.

Section 203(a)(15), Definition of "contract carrier by motor vehicle," 49 U.S.C. 303(a)(15).

Section 203(a)(16), Definition of "motor carrier," 49 U.S.C. 303(a)(16).

Section 203(a)(17), Definition of "private carrier of property by motor vehicle," 49 U.S.C. Section 303(a)(17).

Section 203(c), Regulation of For-Hire Transportation, 49 U.S.C. 203(c).

Section 209(a)(1), Permits for Contract Carriers by Motor Vehicle, 49 U.S.C. 309(a)(1).

QUESTION PRESENTED

Whether, when an individual leases a vehicle owned by him to a shipper, accepts "employment" by the same shipper as a driver, ordinarily of the same vehicle, bears *all* expenses incidental to performing transportation of

the shipper's goods, is compensated for both his vehicle and his service as a driver solely upon the basis of the transportation actually performed, and thereby bears the entire risk of profit and loss (the shipper not guaranteeing to provide any freight or call upon the individual for any service whatever), the transportation so performed constitutes private carriage by the shipper of its own property or transportation for-hire on the part of the individual.

STATEMENT

The Oklahoma Furniture Manufacturing Co. (Oklahoma), one of the appellees, is engaged in the manufacture of furniture at Guthrie, Okla., which it sells to retail dealers throughout the United States (R. 40, Ex. 1, R. 43, 104). A substantial portion of Oklahoma's freight (outbound shipments of furniture and inbound shipments of raw materials), moves in trailers owned by Oklahoma (R. 40-41). Motive power to transport these trailers is provided in two ways (R. 40-41), the distinction between the two being one of the most significant aspects of the case.

Oklahoma owns 6 tractors (R. 41) and, in addition, leases a tractor from each of the several individual appellees (the individual plaintiffs below) (R. 40). Both the company-owned tractors and the leased tractors are used to effectuate the movement of Oklahoma's trailers in interstate commerce.

Each of the owner-operators (the individual appellees) from whom a tractor is leased is also "employed" by Oklahoma as a driver (R. 42). Ordinarily, as found by the court below (R. 16), the leased tractors are utilized for long hauls (R. 79) and each is driven by its owner (R. 76, 81). Oklahoma regularly employs 6 other drivers to operate the company-owned tractors (R. 41). These company-owned tractors, operated by the 6 salaried drivers, are ordinarily used for short hauls (R. 73, 78).

The tractor leases executed between Oklahoma and each of the owner-operators generally provide for compensation at a specified rate per mile depending upon the size of trailer transported and the direction of movement (Ex. 2, R. 43, 109; R. 46-48, and R. 54-55).[1] They require the owner-operators to bear all operating costs including license fees. Though they provide that Oklahoma will maintain and repair the equipment, this provision is inconsistent with the union contract (Ex. 5, R. 43, 128), discussed below, and in fact, as found by the Interstate Commerce Commission (R. 149), and by the court below (R. 16), each owner-operator maintains his own vehicle (R. 51, 53, 56, 60, 67). The leases further specify that Oklahoma will not be liable for wear, tear, and depreciation nor for any damage caused to the equipment by accident, theft, fire or any other hazard or casualty (R. 111). The lease does not provide any fixed or minimum rental and if a vehicle is not used, no payment is due. (Ex. 2, R. 109-113). In short, Oklahoma has effectively arranged to purchase one essential element of transportation on a strictly transportation basis (compensation per mile) and has avoided any of the incidental expenses or obligations.

With respect to drivers—the other essential element of transportation—Oklahoma entered into a union contract (Ex. 1, R. 43, 104; Ex. 5, R. 43, 128), which carefully distinguishes between employee drivers and the owner-operator drivers (R. 140). Under it the employee drivers receive a regular salary plus 2 cents per mile for actual driving (R. 140, R. 73-74, 78). The owner-operator drivers are paid on a mileage basis—5 cents a mile for driving outbound and 6 cents a mile for backhauls of raw materials (R. 142-143; R. 78). The owner-operator drivers, as noted above, are required to maintain their own equip-

[1] The leases provide that the owner-operators receive a higher rate per mile for inbound transportation of raw materials than for the outbound movement of furniture (Ex. 2, R. 43, 109).

ment. (R. 143). They are also required to pay their own living expenses while on the road (R. 143). The contract contains a provision guaranteeing employees 6 hours work or pay if they report for work at their usual or regular time and specifically states that this provision will not apply to the owner-operators (R. 132, 142).

The owner-operators actually work only when called by Oklahoma (R. 69). The company is not bound to use their services, and if they are not used they receive no pay (R. 63, 78, 86). Thus, with respect to the owner-operators, Oklahoma has effectively arranged to purchase the second essential element of transportation—the driver service—on a purely transportation basis (compensation per mile) and again has avoided any of the incidental expenses or obligations.

Viewing the arrangements entered into by Oklahoma to both "lease" equipment and "employ" the owners thereof as drivers, it is apparent that the substance is simply the purchase of transportation service. Neither the lease nor the union contract binds Oklahoma in any fashion except to pay compensation at the specified per mile rates when transportation is actually performed. When Oklahoma does call upon the owner-operators to provide transportation service it undertakes no transportation obligations and assumes no risk.

It is true that the lease agreements provide that Oklahoma has the sole right to control the use of the vehicle. But in practice that control consists at most of deciding when and where trucks are to move, accomplishing the loading, and selecting (if, indeed it does) the shortest route as the route upon which compensation will be based. Indeed, the record shows that the "control" exercised by Oklahoma with respect to the routing of vehicles consists of having once given the individual owner-operators a route book or route sheet which shows the short route between various points in the United States. Witness

Kennedy, Oklahoma's truck superintendent, testified that the drivers "should have in their possession, they did have at one time if they haven't lost them, one of those route sheets and they had better take the short route, yes, sir." (R. 72). It is clear that Oklahoma does not purport to manage the operation of leased vehicles in the actual movement, does not designate the route to be followed for each individual movement, and has no interest in the routes actually followed by the owner-operators inasmuch as compensation will only be paid for the short route.

To summarize, the owner-operators bear *all* of the expense incident to the performance of transportation in their own equipment. Moreover, they bear all of the risks attendant upon such operations,[2] with the sole exception of public liability and property damage insurance, which is furnished by Oklahoma (R. 55). In consequence, Oklahome receives a transportation service at a fixed cost per mile. The investment of time and money in the hope of profit but with the attendant risk of loss is that of each of the owner-operators.

The Interstate Commerce Commission concluded that transportation performed under the arrangements described constitutes carriage for-hire on the part of the individual owner-operators (R. 161). It further concluded that such transportation was unlawful in the absence of

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[2] Witness Walker, Vice President of Oklahoma, testified in substance that one of the benefits to Oklahoma is that the owner-operators bear the risks. He said (R. 82):

> "Well, when a man owns his own equipment, why, it's perfectly natural that he's going to be more particular with it, he's going to see that it's kept in good running condition, he's going to be very particular not to have an accident because if he should, why, it comes out of his pocket, and everything considered, why, our experience has proved that from every standpoint that you look at it the company is much better off where the owner of the equipment operates it."

appropriate authority issued pursuant to the requirements of the Interstate Commerce Act, and it entered an order requiring the owner-operators to cease and desist from such unlawful transportation. The United States District Court for the Western District of Oklahoma apparently concluded that the transportation performed by the individual owner-operators was bona fide private carriage on the part of Oklahoma, and vacated, set aside and annulled the order of the Interstate Commerce Commission (R. 24, 25).

SUMMARY OF ARGUMENT

In evaluating the relatively simple body of record facts the remedial and broad scope of the act must be seen in focus. If the objectives of the act, clearly stated in the controlling National Transportation Policy, may be lightly regarded and easily avoided, the whole scheme of regulation may be thwarted. This result both the Commission and the courts have sought to prevent.

The body of facts must be treated as a whole and, in this treatment, they must be properly related and rightly evaluated. Moreover, the facts must be seen as producing results. The group fact situations at bar, consciously created and intentionally arranged, may not thereafter be individually fragmented. To separate, isolate and insulate the facts will produce error. This, we respectfully submit, has been done, contrary to precedent.

Who was here transporting the goods? The conjunction of facts demonstates that it was the owner-operator drivers. In the total enterprise they bear the full risk of loss. Indirection is to be avoided and substance and reality allowed to prevail. Where substance and reality are present their normal and legal effect may not be diluted by the intrusion of the insubstantial and unreal.

ARGUMENT

The Broad Scope of the Interstate Commerce Act

Insofar as this appellant has been able to determine, this case, involving as it does the question of the type of carriage being performed with leased vehicles driven by the owners thereof, is one of first impression in this Court. A number of substantially similar cases have, however, come before the District and Circuit Courts and particularly before the Court of Appeals for the 10th Circuit, the jurisdiction within which the decision being appealed was rendered.[2]

This proceeding presents an issue of nationwide significance which is of especial importance to the motor transportation industry and thereby to the public. The decision of the court below held that the described transportation arrangements constitute private carriage by the lessee-employer, although that person does nothing but pay for transportation service performed by another.

Transportation costs and charges have been and remain compulsive temptations for designing means to escape regulation. Yet, the public interest in regulated transportation is broad and pervasive as evidenced by the forceful language of the National Transportation Policy (See Appendix). By its terms that policy establishes the fundamental principle that any and all arrangements for

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[2] See, e.g., *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948); *Interstate Commerce Commission* v. *Werner*, 106 F. Supp. 497 (E.D. Ill., 1951); *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361 (E.D. Mich., 1950); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (10th Cir., 1942), cert. denied 317 U.S. 650; *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d. 358 (10th Cir., 1958); and *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d. 163 (10th Cir., 1960).

transportation in interstate commerce substantially equating regulated transportation must be carefully scrutinized. Both Congress and the Interstate Commerce Commission, in recognition of that principle, have expressed deep concern about the threat to regulated transportation posed by various arrangements which seek the guise of private carriage.[4] And this threat has been recognized by the courts.[5]

The critical issue posed by the decision of the court below is whether the dividing line between private carriage and regulated carriage may properly be found so close to the latter category that transportation purchased by a shipper who assumes none of the burdens or risks of conducting such service may be held to be private carriage. The issue is strikingly presented by the sharp contrast between the decision of the court below and that of the 10th Circuit Court of Appeals in *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 164-165, where the following appears:

> "* * * The Act is highly remedial in nature; and in order to effectuate its purposes in the public interest, it is to be liberally construed. *Its terms are sufficiently broad and comprehensive in scope to bring within its reach all those who are in substance engaged in the business of transporting property by motor vehicle on the public highways for hire, no matter the method or procedure employed.* And compliance with its regulatory exactions is not to be evaded through means of subtle arrangements or shades of forms if the substance and effect of the operation bring it within the purview of the Act.

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[4] See the reports of the Committees on Interstate and Foreign Commerce of the House of Representatives and of the United States Senate recommending passage of the Transportation Act of 1958 (H.R. Rep. No. 1922, 85th Cong., 2d Sess., and S. Rep. No. 1647, 85th Cong., 2d Sess.).

[5] *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948).

A. W. Stickle & Co. v. *Interstate Commerce Commission*, 10 Cir., 128 F. 2d 155, certiorari denied 317 U. S. 650, 63 S.Ct. 46, 87 L.Ed 523; *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F. 2d 358; *Vincze* v. *Interstate Commerce Commission*, 9 Cir., 267 F.2d 577." (Emphasis added)

Similarly, the decision of the court below is to be contrasted with that of the court in *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210, 212 (5th Cir., 1941), where it is stated:

"• • • In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire;" • • •

The thrust of the *B & C* and *Georgia Truck* cases, supra, is simply the proposition that if the provisions of the Interstate Commerce Act can be lightly or easily avoided the entire regulatory scheme will be thwarted.[8] The threat to regulated transportation and the accompanying detriment to the public interest flowing from a narrow or restricted interpretation of regulated carriage and a broad or liberal interpretation of private carriage was well stated by the court in *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948), as follows:

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[8] See, also, *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir., 1958); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (10th Cir., 1942); and *Vincze* v. *Interstate Commerce Commission*, 267 F. 2d 577 (9th Cir., 1959).

> "* * * when, as in this case, a transportation service is in fact rendered under the guise of the leasing of vehicles to shippers, the transportation costs and rates become a subject of barter between the vehicle owner or truck rental operator and the shipper. In order to insure to the public equality in rates and service for essential transportation, Congress enacted the Interstate Commerce Act, and if the practice of providing unregulated transportation under the guise of leasing vehicles were to become a general practice, the regulated agencies of transportation would be seriously impaired. Shippers and the public would be deprived of transportation service at equal rates and service."

This Court is here asked to review an interpretation of the regulatory provisions of the Interstate Commerce Act which sanctions as private carriage, and thus carriage beyond the pale of regulation, devices or arrangements designed to escape regulation which in net result so resemble transportation for-hire as to be indistinguishable from it. We respectfully suggest that such arrangements and devices, which necessarily have the effect of eroding the traffic of regulated carriers, were not given the Congressional imprimatur and that the decision of the court below is not in harmony with the National Transportation Policy and the Interstate Commerce Act nor with controlling precedent.

The Mistaken Rationale of the Court Below

The court below concluded that the findings of the Interstate Commerce Commission were not supported by substantial evidence. Thereby it held that Oklahoma actually controlled the transportation of its products and that the owner-operators were not in substance engaged in transportation for-hire. In so doing, it noted that the Commission, in resolving the primary issue, had utilized two tests:

(1) Did any one other than the company (Oklahoma) have any right to control, direct and dominate the transportation involved, and

(2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for-hire? (R. 20).

The court recognized that both tests have been approved by the courts (R. 21).

After stating the two tests the court criticized the reasoning of the Commission in using a presumption[7] to reach a conclusion with respect to the first or "control" test (R. 21-22). Thereafter, the court made it plain that it viewed the case as not involving a lease of equipment with drivers, but rather as a lease of equipment alone with drivers to be supplied by Oklahoma (R. 22). Herein lies the fundamental error committed by the court for in so characterizing the case it failed to view the arrangement between Oklahoma and the individual owner-operators as a whole. In other words, it treated the equipment leases in isolation from the union contract covering employment of the lessors as drivers of the leased equipment.

The Interstate Commerce Commission has frequently noted that the two significant instrumentalities of transportation are the equipment and the driver.[8] Similarly, in *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (E.D., N. Y. 1947), affirmed per curiam 331 U. S. 784, the court recognized that where the owner of a vehicle merely furnished that vehicle, and the driver was supplied by the

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[7] The presumption was discussed by the Commission in its decision (R. 153-156) and was first set forth by the Commission in *H. B. Church Truck Service Co., Com. Car. Application*, 27 M.C.C. 191 (1940).

[8] See, e.g., *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191 (1940), and *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958).

shipper, the owner was not engaged in transportation for-hire. The court further observed, at page 21, that where an equipment owner furnished both the vehicle and the driver, was compensated on a mileage or time basis, paid the hire and other incidental expenses of the driver, agreed to maintain the leased equipment in good order and repair, and to garage and fuel the trucks, but did not undertake specifically to transport cargo or to be responsible for loss or damage, the operation constituted transportation for-hire which required appropriate operating authority from the Interstate Commerce Commission.

And, with respect to the provision to a shipper of both of the significant instrumentalities of transportation the Court of Appeals for the Second Circuit in *Bridge Auto Renting Corp.* v. *Pedrick,* 174 F. 2d 733, 737 (1949) said:

> "We may well start with that part of its business which it is conceded does not make it such a transporter. That is the larger part where it furnishes to its customers trucks which it maintains in operating condition either by repair or substitution and prescribes conditions to be observed by the 'lessees' as to the operation of the trucks. In this operation it performs a very large part of the function of transportation, but it stops short of supplying a feature which is essential to the transportation of anything by means of a truck by failing to provide a driver. If it did provide trucks in this way and in addition its own employees as drivers, with directions to carry the property of its customers where, when and as they directed, it would seem perfectly clear that the money it received for so doing was for performing the service of carrying the property. It would then be doing almost all that any carrier does for its customers.
>
> "In the situation just stated the truck owner would be none the less transporting property because he was paid on a time plus mileage basis for the use of the truck and had no immediate incentive to operate efficiently. The result would be the same though the

> truck owner was merely reimbursed for the out-of-pocket expense of providing the drivers and could have no opportunity to make a profit on that phase of the operation. It is inconceivable that such a transporter of property would not, as a matter of business, have to provide suitable drivers, acceptable to his customers, for performing the kind of transportation undertaken efficiently. Nor would the fact that one or more of the customers itself insured its property as it saw fit while it was being transported make it the transporter."

By viewing the case as it did the court below forecast its ultimate conclusion and invalidated the reasoning which it stated in support of that conclusion. Plainly, the court did not look to the ultimate result achieved by Oklahoma in utilizing the owners of vehicles which it had leased to drive such vehicles. Thereby the court precluded itself from resolving the primary issue stated by it in the language of the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358, (1958), as: "Simply stated it is who was transporting the goods in question." (R. 17)

Where only one of the two significant instrumentalities of transportation is furnished to a shipper who himself provides the other there cannot be transportation for-hire. The significant issue in this case is whether, when the lessor of a vehicle drives that vehicle in the transportation of the lessee's property even though the lease and the employment contract are separate agreements, the concurrence of the two significant instrumentalities emanating from a single person results in transportation for-hire. Peculiarly in point to this case is the discussion of the Tenth Circuit Court of Appeals in *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 165 (1960), as follows:

> "• • • One engaged exclusively in leasing trucks for use by others in the transportation of their own property on the highways or one engaged solely in

> furnishing drivers to drive trucks for others in the transportation of their own property on the highways, without more, is not required to obtain a certificate of convenience and necessity or a permit issued by the Commission. *Georgia Truck System* v. *Interstate Commerce Commission*, 5 Cir., 123 F. 2d 210. But if the leasing of trucks and the furnishing of drivers are intentionally linked together in a manner to constitute constituent elements in a concert of action which effectuates the transportation of property in interstate commerce for hire without either party to the arrangement having a certificate of convenience and necessity or a permit issued by the Commission, the leasing of the trucks and the furnishing of the drivers as constituent elements of the forbidden transportation are within the reach of the Act. *In other words, such activities in isolation each from the other are not within the purview of the Act; but when they are intentionally bound together as constituent parts of an operation which contravenes the Act, they come within its sanctions. Swift & Co.* v. *United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L. Ed. 518." (Emphasis added)

By initially assuming that the activities of the owner-operators in leasing their vehicles and furnishing themselves as drivers thereof were isolated, the court below failed to consider the result of their being bound together as constituent parts of a single operation, and thereby failed to appraise the substance of the transaction. Accordingly, the court below erred in setting aside the order of the Interstate Commerce Commission.

The Individual Owner-Operators Are In Substance Engaged In Transportation For-Hire

The essential inquiry in this case is whether the transportation of Oklahoma's property under the circumstances described constitutes carriage for-hire on the part of the individual owner-operators. In the words of the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (1958), the question is "who

was transporting the goods in question." In that case, pages 360-361, the court succinctly stated the approach to the resolution of the issue by quoting its own decision in *A. W. Stickle & Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155, 160, cert. den. 317 U. S. 650, as follows:

> "'A carrier may not avoid the requirements of Part II, supra, by subterfuge or device, or by posing as a private carrier when, in substance and reality, he is engaged under individual contracts in transportation by motor vehicle of property in interstate commerce for compensation. Ownership of the commodity transported is not the sole test. The primary test in §§ 203(a) (14) and 203 (a) (15) [49 U.S.C.A. § 303 (a) (14, 15)] is transportation for compensation.' (Footnotes omitted.) 128 F. 2d 160.
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> "• • • The history of Poynor and Lamb Trucking shows that its essential business is that of transportation, not the rental of motor vehicles. • • •"

In its decision in the *Stickle* case the Tenth Circuit Court of Appeals referred to and quoted *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941). In the latter case it was plainly stated that the substance of transportation arrangements determines the type of carriage being performed. The language of the court in that case, previously quoted herein, is particularly apposite to the case at bar.

The significance and importance of relying upon substance rather than form for determining the nature of a transportation service in view of the well recognized purposes of the Interstate Commerce Act is exemplified by the following discussion from the decision of the court in *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948):

> "It is the frequent practice in the motor carrier industry for carriers to augment their over-the-road

equipment by leasing vehicles from owner-operators who are also employed to drive the vehicles. Owner-operators who own or control several units of equipment are in fact engaged in the truck rental business. The traffic handled in such leased equipment by an owner-operator becomes an integral part and parcel of the authorized carrier's operations. The published rates of the lessee carrier control the transportation costs to the public, and as to the operations of such leased vehicle the lessee carrier assumes full responsibility for compliance with all applicable statutes and the rules of the Commission governing the duties of the carrier to the shipper and to the public generally (*Dixie Ohio Express* case, 17 M.C.C. 735, 752). This practice by authorized carriers does not impair necessary public regulation. On the other hand, when, as in this case, a transportation service is in fact rendered under the guise of the leasing of vehicles to shippers, the transportation costs and rates become a subject of barter between the vehicle owner or truck rental operator and the shipper. In order to insure to the public equality in rates and service for essential transportation, Congress enacted the Interstate Commerce Act, and *if the practice of providing unregulated transportation under the guise of leasing vehicles were to become a general practice, the regulated agencies of transportation would be seriously impaired.* Shippers and the public would be deprived of transportation service at equal rates and service." (Emphasis added)

Implicit in the case at bar is the simple fact that the purpose or motive of the individual owner-operators is to profit from the utilization of their vehicles and their services in the transportation of Oklahoma's goods. Inasmuch as they neither undertake nor perform any other activity on behalf of Oklahoma, and inasmuch as their compensation is measured by and limited to the quantum of transportation performed, the sum and substance of their activity is necessarily transportation for-hire regardless of paper arrangements or separate contracts for the separate elements which, taken together, yield the total

service. Such was the holding of the court in *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375, 380-381 (D. Minn., 1950), where the following statement appears:

> "In determining the status of a lessor of motor equipment when vehicles are used by a shipper, the courts have disregarded form, and look only to the substance. * * *
>
> * * * *
>
> "Motor carrier operations must be bona fide and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the transportation will be of no avail for that purpose. *Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier. Interstate Commerce Commission* v. *Isner*, D. C., 92 F. Supp. 582, 583; *Interstate Commerce Commission* v. *F & F Truck Leasing Company*, D. C., 78 F. Supp. 13; *Georgia Truck System* v. *I.C.C.*, 5 Cir., 123 F. 2d 210; *Interstate Commerce Commission* v. *Pickard*, D. C., 42 F. Supp. 351; *John J. Casale, Inc., Contract Carrier Application*, 44 M.C.C. 45, 49 M.C.C. 15; and *Bridge Auto Renting Corporation* v. *Pedrick*, 2 Cir., 174 F. 2d 733." (Emphasis added)

The facts in the case at bar bring it squarely within the doctrine of the cases cited above. Here, each owner-operator stands in the position of an individual entrepreneur for each assumes the entire risk of profit or loss from the transportation service performed by him. With respect to each, Oklahoma simply purchases transportation service at a fixed cost per mile.

Each owner-operator ordinarily drives his own tractor which he has leased to Oklahoma and, indeed, Oklahoma

has a definite policy of having the owner of the vehicle drive it (R. 76, 81). Each owner-operator is responsible for the repair and maintenance of his equipment and while there is some testimony in the record to suggest that Oklahoma inspects the leased vehicles the nature of that testimony suggests that such inspection is at most a matter of form in order to comply with suggestions made by field personnel of the Interstate Commerce Commission (R. 69-70). In any event, the record is clear in demonstrating that the owner-operators bear the expense of repair and maintenance and make the arrangements for such repair and maintenance themselves (R. 51, 53, 56, 60, 67). Additionally, the owner-operators pay their own living expenses while they are on the road. (R. 143) And they also pay all operating costs such as gas, oil, grease, parts, and license fees. (R. 110) For these services they are paid on the basis of cents per mile, receiving one check covering the vehicle lease and one check covering the driver services.

The services of the owner-operators are not used every day, but only when Oklahoma has a load to be transported. And when they are not used they receive no pay (R. 63, 78, 86). Each owner-operator uses his own vehicle for transportation between his home and Oklahoma's plant, and garages the equipment at his home (R. 68-69). The fair conclusion is that the vehicle of each owner-operator remains in his physical possession as opposed to being in the physical possession of Oklahoma. Indeed, the lease agreement specifically provides that Oklahoma will not be responsible for damage to the vehicle from any cause and states that if the owner-operator carries collision, fire, theft, or any other type of insurance he must do so at his own expense. (R. 111-112)

Both the court below and the Commission found that when an owner-operator is to transport a load of Oklahoma's products he is instructed as to routes and delivery

points and given a truck bill manifest. But let there be no misunderstanding as to the nature of the "routing instruction." The record is clear in revealing that the owner-drivers are not given detailed instructions with respect to each trip. Rather, they were at one time given a route sheet which they should still have, if it has not been lost. Oklahoma assumes that they take the short route between points as shown by that route sheet (R. 72). The owner-operators, having been advised of the delivery points and given a truck bill manifest, transports the property to destination, picks up a return load, if any, delivers that to Oklahoma, and goes home. These elements, far from indicating that the transportation operation is that of Oklahoma in private carriage, are but the normal incidents of any contract carrier service dedicated to a particular shipper.[9]

In reviewing both the Commission's determination that the owner-operators are in substance engaged in trans-

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[9] *R.N.G. Commercial Auto Rentals, Inc., Contract Carrier Application*, 73 M.C.C. 665, 669 (1957). See also, *McKeown Transp. Co., Contract Carrier Application*, 42 M.C.C. 792, 796 (1943), where the Commission said:

> "* * * Although it is stated that the vehicles are under the direction of the shipper to which they are assigned, this direction does not appear to have consisted of anything more than instructions as to the points at which deliveries were to be made and the time at which a trip should be operated. Such practices are natural concomitants of any contract-carrier operations under which specified units of equipment are devoted exclusively to the needs of a single shipper and do not necessarily imply direction and control by the shipper. * * *"

And see *Allen* v. *United States*, 187 F. Supp. 625, 629 (S.D. Fla., 1960) where the court said:

> "* * * The shipper exercised little, if any, control over the vehicle or driver. The assertion that the shippers directed the place of delivery carries no weight to support the conclusion that the transportation was private, since in transportation for hire, the shippers must always, of course, instruct the carriers where to deliver the load. * * *"

portation for-hire, and the discussion of the same point by the court below, the striking and significant similarity of those operations to the definition of contract carriage in Section 203(a) (15) of the Interstate Commerce Act (49 U.S.C. 303(a) (15)) cannot fail to be noted. That section provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation * * * under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

The remarkable resemblance between the transportation operations here involved and the definition of contract carriage can be readily seen in the statement of the Commission in its decision, 79 M.C.C. 403, 412 (R. 156-157), as follows:

> "Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the Company, furnishing a service designed to meet the distinct need of the Company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses. * * *"

The law is clear that where, absent appropriate authority, the substance of an arrangement is transportation for-hire it is in violation of the Interstate Commerce Act regardless of the paper forms under which the opera-

tion may be conducted.[10] Thus, in *Interstate Commerce Commission* v. *Werner*, 106 F. Supp. 497, 500 (F. D., Ill., 1951), the court based its decision that the operations there involved constituted carriage for-hire on the substance of the arrangement, saying:

> "The issue of whether a contract carrier status subject to regulation exists between the parties and as to Lawrence R. Werner is to be determined by how much service which goes with ordinary contract carriage for compensation on public highways in interstate commerce was being furnished by defendant Lawrence R. Werner in addition to th leased vehicles; also whether on the whole a transportation service was being rendered by him to Centralia Petroleum Co., rather than simply furnishing for private operation the vehicles to it, in the same manner as would normally obtain if it were the owner of the equipment. * * *"

Similarly, the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, supra, based its ultimate conclusion on the resolution of the question of whether the operations there involved were in substance carriage for-hire. See, also, the decision of the Tenth Circuit Court of Appeals in *B & C Truck Leasing* v. *Interstate Commerce Commission*, supra. Indeed, to hold otherwise would be to abrogate the broad scope and remedial nature of the Interstate Commerce Act by permitting paper form to take precedence over actual fact. Therefore, "where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements

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[10] *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F.2d 210 (5th Cir. 1941); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn. 1948); *Lamb* v. *Interstate Commerce Commission*, 259 F.2d 358 (10th Cir. 1958); and *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F.2d 163 (10th Cir. 1960).

which purport to give the alleged lessee the status of a private carrier." [11]

In the case at bar the individual owner-operators each provide to Oklahoma both equipment and a driver. They assume all of the burdens and costs of the transportation operation including vehicle maintenance and repair with only two exceptions. First, they do not provide cargo insurance, but this is not persuasive as to the nature of the carriage performed for contract carriers are not required to provide such protection.[12] Second, Oklahoma, as the shipper and "paper lessee," provides public liability and property damage insurance. Significantly, this is the only tangible burden or responsibility with respect to the conduct of the transportation operation which Oklahoma assumes. And this is of little moment in determining whether the owner-operators are engaged in carriage for-hire for, as the Commission has held:[13]

> "* * * In the last analysis a shipper's assumption of any of a carrier's responsibility to the public, in this day when such responsibilities readily can be passed on to insurers, is little more nor less than a rate adjustment."

On the basis of the facts it is apparent that Oklahoma has endeavored to avoid regulation under the Interstate Commerce Act by giving to the transportation of its property the character of private carriage, but has at the same time attempted to avoid the burdens and risks attendant upon the conduct of transportation service. No matter how sincere the motives of Oklahoma or of the individual

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[11] *United States* v. *La Tuf Transfer Service*, 95 F. Supp. 375, 381 (D. Minn., 1950).

[12] *Motor Haulage Co., Contract Carrier Application*, 46 M.C.C. 107, 117 (1946), aff'd 70 F. Supp. 17, aff'd. per curiam 331 U. S. 784.

[13] *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958).

owner-operators the facts reveal that in substance each owner-operator is engaged in carriage for-hire. As the court said in *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351, 354 (W.D., N. Y., 1941):

> "We do not question the sincerity of purpose of the parties in making this lease. We do not question that they believed that by this means the corporation became a private carrier and not subject to the provisions of the Motor Carrier Act. We believe that their efforts were honestly made, but we also believe that the purpose sought was not accomplished."

In the case at bar the individual appellees have entered into arrangements with Oklahoma under which each leases to Oklahoma a motor vehicle and by separate agreement each is hired to drive that motor vehicle. Each owner-operator assumes the principal burdens and responsibilities of providing transportation to the extent that each bears all significant costs of providing such service and assumes the risk of profit or loss from the rendition of such service. We respectfully submit that only one conclusion as to the status of the transportation operations of these appellees is possible. That is, that each of the individual owner-operators has engaged in unlawful transportation for-hire. But more importantly, the facts and the law considered, it cannot be said that the judgment of the Interstate Commerce Commission lacks a rational basis,[14] is not warranted,[15] is not sensible,[16] is not supported by substantial evidence,[17] or is arbitrary, capri-

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[14] *Miss. Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934).

[15] *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) and *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

[16] *Grey* v. *Powell*, 314 U.S. 402 (1941).

[17] *Rice & Co., Inc.* v. *United States*, 100 F. Supp. 468 (W. D., Mo.,) aff'd. 342 U. S. 937, rehearing denied 343 U.S. 937.

cious, or an abuse of discretion. The court below has failed to give the findings and conclusions of the Interstate Commerce Commission the special weight to which they are entitled,[18] and its opinion should be reversed.

CONCLUSION

The Interstate Commerce Act is remedial and its terms are sufficiently broad to include within them all those who, no matter what form they use, are in substance engaged in the business of interstate transportation for-hire.[19] Accordingly, motor carrier operations must be conducted in good faith without subterfuge or attempted evasion of the letter or obligation of the law.[20] And, similarly, bona fide attempts to avoid the Act which nevertheless result in substance in carriage for-hire fall short of their goal and such transportation is unlawful.[21] If the practice of avoiding transportation regulation through the guise of leasing vehicles were to be easily accomplished or to become general, the regulated agencies of transportation would be seriously impaired and the public denied transportation service at equal rates and charges.[22]

The Oklahoma Furniture Manufacturing Company receives from the individual owner-operators all of the essential elements of a for-hire transportation service. The substance of the arrangement between the parties is that the owner-operators assume the burdens and risks of pro-

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[18] *Levinson* v. *Spector Motor Service*, 330 U.S. 649 (1947).

[19] *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941).

[20] *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn., 1950).

[21] *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351 (W. D., N. Y. 1941).

[22] *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948).

viding a service for which they are paid by Oklahoma on the basis of the quantum of service rendered. This is essentially what any for-hire carrier does, and when performed in the absence of appropriate operating authority issued by the Interstate Commerce Commission it results in a violation of the Interstate Commerce Act.

WHEREFORE, the Regular Common Carrier Conference of American Trucking Associations, Inc., respectfully prays this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

REGULAR COMMON CARRIER CONFERENCE
of the
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August 25, 1961

APPENDIX

National Transportation Policy, 49 U.S.C. preceding §§1, 301, 901 and 1001

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;— all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(a)(15), Definition of "Contract Carrier by Motor Vehicle," 49 U.S.C. 303(a)(15).

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exceptions therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person

served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 203(a)(16), Definition of "Motor Carrier," 49 U.S.C. 303(a)(16).

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Section 203(a)(17), Definition of "Private Carrier of Property by Motor Vehicle," 49 U.S.C. Section 303(a)(17).

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commerical enterprise."

Section 203(c), Regulation of For-Hire Transportation, 49 U.S.C. 203(c).

"Except as provided in section 202(c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign

commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

Section 209(a)(1), Permits for Contract Carriers by Motor Vehicle, 49 U.S.C. 309(a)(1).

"Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 23

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 13–24) is reported at 193 F. Supp. 275.

JURISDICTION

The judgment of the district court was entered on August 13, 1960 (R. 25). The United States and the Interstate Commerce Commission filed notice of appeal on October 12, 1960 (R. 26–28, 31–33), and this Court noted probable jurisdiction on March 20, 1961. 365 U.S. 839. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Each of the individual appellees owns a truck tractor which he operates under a leasing arrangement with the Oklahoma Furniture Company in the interstate transportation of the company's furniture to various dealers located at different points throughout the United States and in the back-haul of raw materials used by the company in the manufacture of its products. The owner-operators are compensated for the use of their trucks and for their services as drivers solely on the basis of the number of miles driven; they bear all of the operating costs of the transportation, including the cost of gasoline, grease and oil, parts, and any necessary commercial license plates, and are responsible for the maintenance and repair of their equipment. The company does not obligate itself to provide any minimum amount of shipments; it uses the services and equipment of the owner-operators only when it chooses.

The question presented is whether transportation of a shipper's goods by motor vehicles driven and maintained by their owners, under the conditions mentioned above, constitutes "transportation * * * for compensation" performed by the owner-operators, subject to economic regulation under the Interstate Commerce Act.

STATUTES INVOLVED

Sections 203(a) and 209(a) of the Interstate Commerce Act (49 Stat. 544, 552, as amended, 49 U.S.C. 303, 309(a)) provide in part as follows:

> SEC. 203(a). *Definitions.*
> As used in this part—
>
> * * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

* * * * *

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 203(c). Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to

such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

* * * * *

SEC. 209(a)(1). Except as otherwise provided in this section in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *.

STATEMENT

1. This is a direct appeal from the final judgment of a three-judge district court setting aside and annulling an order of the Interstate Commerce Commission entered on April 22, 1959 (R. 166). The Commission had found (R. 156–157) that interstate transportation services rendered to the Oklahoma Furniture Company ("Oklahoma") by the owner-operators of tractors pursuant to a lease arrangement that purported to give Oklahoma control of the operations were essentially the same as those normally provided by contract carriers since the owner-operators assured the shipper complete transportation at a fixed and

definite cost and assumed all of the financial risks of the operation. On this ground, among others, the Commission directed the owner-operators to refrain from engaging in such transportation without obtaining appropriate authority from the Commission (R. 166). The three-judge court set aside the Commission's findings and order on the ground that Oklahoma's retention of "control" of the operations made the transportation private carriage not subject to economic regulation under the Interstate Commerce Act.

The relevant facts, which are not in dispute, are as follows:

Oklahoma is engaged in the manufacture and sale of low-priced furniture sold to retail dealers throughout the United States. Prior to October 1952, Oklahoma shipped its manufactured product to retailers in company-owned tractors and trailers[1] operated by full-time salaried employees of the company. It was discovered, however, that a number of these drivers were defrauding the company by various schemes involving the improper use of company credit cards[2] which had been issued to the drivers for the purpose of charging truck and living expenses on the road. Thereafter, Oklahoma decided to change its long-haul operations to a system whereby the drivers would own and maintain their own tractors, which would be

[1] For heavy hauling of the type involved here, the "truck" consists of a "tractor", the front-end motive power, to which are attached "trailers", without power of their own, in which the freight is physically placed.

[2] The company computed its credit-card losses over a three year period at approximately $27,000 (R. 106).

leased to the company, the drivers being compensated on a mileage basis with an adjustment for back hauls of raw materials.[3]

"The principal reason Oklahoma changed its operations to the lease agreement was to avoid drivers' breaches of trust, and to reduce its cost of operation" (R. 106, 82), for the company's management was of the opinion "that a man operating his own tractor would operate it more carefully and be more careful to properly maintain [the] tractor when he was responsible not only for the cost of maintenance but for any deterioration on [the] vehicle due to improper maintenance" (R. 106). Accordingly, lease arrangements (Ex. 3, R. 114–119) were initially drawn up which required that the owner-operator, at his own expense, provide property damage and public liability insurance covering the operation of the leased vehicle (R. 117), comply with workmen's compensation laws with respect to all persons engaged in the operation (*ibid.*), pay social security taxes (*ibid.*), and bear the expense of all licenses, public utility franchise and permit fees, and all applicable taxes (R. 117–118). The owner-operator was also made liable to Oklahoma, when pulling a company-owned trailer, to the extent of $250, for any damage other than ordinary wear occurring to the trailer while in his custody or attached to his tractor (R. 118). The owner-operator reserved the right to operate the leased equipment in the serv-

[3] Oklahoma retained a few full-time salaried drivers primarily for short-haul operations and presently owns and maintains six tractor units (R. 77, 78–79). Eleven tractors are leased from owner-operators under the present plan (R. 77).

ice of any other concern when not engaged in the business of the company (R. 116).[4]

Subsequently, in 1955, after one of the owner-operators had been arrested in Arkansas for operating without appropriate authority on the highways of that state as a motor vehicle carrier, a suit was filed in the Arkansas state courts for a declaratory judgment that such owner-operators were not motor carriers within the meaning of the applicable Arkansas statute. In *Robinson* v. *Woodard*, 227 Ark. 102, 296 S.W. 2d 672 (1956), certiorari denied, 353 U.S. 988, the Supreme Court of Arkansas held that the arrested owner-operator was performing a transportation service, not as an employee of Oklahoma, but as a contract motor carrier. This litigation resulted in the execution, in July 1957, of a new lease (Ex. 2, R. 109–113) designed to "make [the owner-operators] employees" (R. 90, 91). This is the lease now in effect.

Under the terms of the present lease, Oklahoma has the sole right to control the use of the vehicles (R. 111); and it may not sub-lease the vehicle to a third party during the life of the agreement (*ibid.*). The lease is to last for one year (R. 112), but each party may cancel on 30 days' notice (*ibid.*). Payment for the use of the vehicle and for the owner's services as driver is based exclusively on mileage (R. 109–110, 142–143), computed by the company on the basis of the shortest point-to-point route (R. 110, 72). If the vehicle is not used no payment is due. Oklahoma

[4] The initial lease was replaced by a substantially similar lease in 1956 (Ex. 4, R. 121–127).

does not bind itself, under either the lease or the union contract (which covers the owner-operators as well as the full-time salaried drivers), to provide the owner-operators with freight; in fact, the services of the owner-operators and the use of their trucks are not required every day (R. 69).

By separate contract (R. 128–143), Oklahoma retains the owners as drivers. It is the usual practice and policy that they operate their own vehicles, but in occasional emergency situations others drive their vehicles and they drive the vehicles of others (R. 76, 81–82). If their services as drivers are not used, they receive no pay (R. 78). This contrasts with Oklahoma's treatment of its full-time drivers who operate the company-owned trucks. The latter receive a flat rate of $50 per week, regardless of the amount of driving, plus mileage (R. 77). The owner-operators and their vehicles are normally used only on long cross-country trips, while the salaried drivers and the company-owned vehicles are used for travel near the plant and normally are not on the road overnight (R. 79).

The lease provides that Oklahoma agrees to keep the leased vehicles in repair (R. 110). However, under the separate provision of the union contract governing the owner-operators, the responsibility for repair is passed back to them (R. 143) so that in fact, as the court below recognized (R. 16), they are responsible for both the cost of labor and parts used in repairs (R. 67). Oklahoma inspects the vehicles for compliance with I.C.C. safety regulations, but when defects are found the owner-operators have the

responsibility to make or arrange for the necessary repairs (R. 67–68, 51–52).

Ordinary running expenses, including the cost of gasoline, antifreeze, oil, grease and parts, as well as living expenses on the road, are paid for by the owner-operators (R. 110). The lease provides that the company shall retain five percent of all rental compensation due the lessees until $1,000 has been accumulated; the retained compensation is to be refunded at the expiration of the lease, after deduction of any expense which the company is forced to pay for the account of the owner-operator, or any other sums due the company under the contract (R. 111).

Oklahoma decides where and when trucks are to go (R. 111), loads them for outbound trips, and unloads the inbound shipments of raw materials. The lease agreement gives Oklahoma the right to specify the route to be followed (R. 111) and, when sending trucks out, Oklahoma loads the furniture in a way which controls the order in which stops must be made. The compensation, as already indicated, is based on the shortest possible route between stops. The company pays the social security taxes upon, and withholds income taxes from, the sums due the owner-operators as drivers (R. 42). Two weekly checks are issued, one covering the use of the tractor and the other the driving services rendered (R. 64). The company carries public liability and property damage insurance on the leased trucks and insures its own cargoes (R. 112). It does not carry collision, fire or theft insurance; the owner-operators procure

such insurance and bear the cost if they choose to place it on their vehicles (*ibid.*).

2. In proceedings before the Interstate Commerce Commission initiated under § 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)), the Commission determined (R. 161–162) that the owner-operators, when driving their own vehicles for Oklahoma pursuant to the lease arrangement, were engaged in transportation in interstate commerce for compensation. An order was entered (R. 166) directing them to cease and desist from engaging in such transportation without obtaining contract carrier permits from the Commission, as required by § 209(a)(1) of the Act (p. 4, *supra*).[8] Rejecting appellees' claim that the transportation was exempt private carriage performed by Oklahoma itself, with the owner-operators acting solely as employees, the Commission held that Oklahoma did not have the exclusive right to control the transportation operation in question (R. 153–155) and that, in any event, the services performed by the owner-operators were essentially equivalent in character to those performed by contract carriers (R. 160–161). On this latter point the Commission observed (R.156–157), *inter alia*, that the owner-operator:

[8] "* * * [T]he circumstances here," said the Commission (R. 161), "are such that the described operations would not constitute a bar to our finding the owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy."

> * * * assigns his motor vehicle for a continuing period of time to the exclusive use of the Company, furnishing a service designed to meet the distinct need of the Company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses.[6]

Upon review, the three-judge district court set aside the Commission's order (R. 13–25). It held that the Commission's findings as to Oklahoma's control over the operations were not supported by substantial evidence (R. 22–24). It concluded that

[6] The Commission found that "the only points of *possible* difference between the service here provided and conventional contract carrier services" were (1) the separate treatment Oklahoma gave to the owner-operators as lessors and employees respectively, (2) Oklahoma's assumption of liability insurance upon the leased equipment, and (3) upon the cargo and (4) its control over the owner-operators as "employees" (R. 157). The control was found to be one of the "concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper" (*ibid.*). Cargo insurance by a shipper was deemed irrelevant in view of the lack of any obligation by contract carriers to insure their shipments, and the shippers assumption of liability insurance "little more nor less than a rate adjustment" (*ibid.*). Finally, the Commission concluded that giving effect to the formal separation between the functions of the owner-operator as lessor of the equipment and as its driver would merely result in opening the door to unfair and destructive competitive practices in contravention of the dictates of the National Transportation Policy. (R. 159).

Oklahoma "had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith" and that, therefore, "[t]he owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company * * *" (R. 22).

SUMMARY OF ARGUMENT

This case involves the drawing of the line between contract carriage, which requires a grant of authority from the Commission, and private carriage, which is exempt from economic regulation under Part II of the Interstate Commerce Act. The problem of delineating the areas of regulated and exempt transportation takes many forms; it is also a constantly recurring matter and one of grave concern to the Commission because of the substantial economic threat which unauthorized operations pose for members of the regulated industry who have assumed the burdens and responsibilities of public carriers. In its present context, the problem turns on the effect of a lease arrangement between the owner-operators of motor vehicles and a shipper-lessee.

The Act defines private carriers in terms of persons not falling within the definitions of contract and common carriers. In this case, therefore, it was necessary for the Commission to decide whether the owner-operators (the lessors) were engaged in transportation for hire (the hallmark of both contract and common carriage) or were merely leasing their equipment and hiring out their services as drivers. This determina-

tion, of course, was primarily one for the Commission, and the function of the courts is confined to the question whether the agency's conclusions have support in the record.

In making its determination in cases of this type, the Commission has invoked two tests, both of which must be satisfied if the transportation is to be regarded as exempt private carriage. The first is whether the shipper has "control." If he does not, plainly there is no basis whatever for concluding that he has taken over the transportation function. In this case, the district court has concluded that there is no substantial evidence to support the conclusion that the shipper does not exercise full control of the details of the shipping operation. We do not seek review of this evidentiary determination or of the question whether the district court viewed the control test too narrowly.

The fact, however, that the shipper so controls the operation (which we shall assume) does not, in and of itself, establish that he is acting as a private carrier. Indeed, it is commonplace for authorized contract carriers, performing as such, to subject their activities to the detailed control of one or more shippers to whom they have dedicated their specialized services. A second and no less critical factor in determining whether the shipper is to be deemed a carrier is whether he has assumed, in addition to control, the entrepreneurial risks and burdens of the transportation business. The undisputed facts of this case, we submit, fully warranted the Commission's conclusion that this shipper did not.

Under the leasing arrangement involved here, the owner-operators receive payment both for the lease of their vehicles and for their services as drivers at a fixed rate computed on the basis of miles of transportation actually performed. Compensation is unrelated to hours of service. Moreover, the owner-operators make the initial capital investment, assume all costs of operation and repair, take the risk of breakdown and road delay and, since the shipper does not guarantee any minimum amount of freight, bear the entire burden of overhead costs, including particularly those arising from non-utilization of time, labor and equipment. The net result is that the shipper purchases transportation (of which he controls the use) at a fixed cost per mile without patronising a regulated carrier and without bearing any of the essential financial risks of engaging in transportation.

In light of this factual situation, discussed more fully *infra*, the Commission's conclusion was, at the least, a permissible one, especially when it is considered that exceptions from the regulatory scheme of the Motor Carrier Act are to be closely confined. *McDonald* v. *Thompson*, 305 U.S. 263, 266. We point out additionally that the result is supported by decisions in comparable cases involving the question of carrier status under the Act and by various decisions involving the status of owner-operators under other statutes. We attach particular significance to this Court's decision in *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704, a case which involved the question whether owner-operators who were party to a lease arrangement of a similar type were "employees" un-

der the Social Security Act of 1935. This Court held that they were not, observing (p. 719) that "where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors." We do not, of course, suggest that status for purposes of one statute is necessarily the same as for another. But the analogy is all the stronger since the underlying policy of the Social Security Act favors "employee" status and that of the Motor Carrier Act calls for strict construction of the exemption provisions.

ARGUMENT

THE COMMISSION PROPERLY HELD THAT THE OWNER-OPERATORS BEAR THE ESSENTIAL RISKS OF MOTOR TRANSPORTATION AND ARE THEREFORE SUBJECT TO THE REGULATORY PROVISIONS OF THE INTERSTATE COMMERCE ACT

The statutory scheme for motor carrier regulation set out in Part II of the Interstate Commerce Act provides for detailed licensing and regulation of both "common carriers" (49 U.S.C. 303(a)(14)) and "contract carriers" (49 U.S.C. 303(a)(15). With certain exceptions, § 203(c) (49 U.S.C. 303(c)) precludes any person from engaging in for-hire motor transportation without a certificate or permit issued by the Commission. Private carriers of property by motor vehicle are not subject to the requirement of certification or to economic regulation, although the Commission is authorized to impose reasonable safety requirements upon their operation.[1]

[1] Section 204(a)(3), 49 U.S.C. 304(a)(3).

Section 203(a)(17) of the Act (49 U.S.C. 303(a)(17)) defines private carriers as persons not falling within the definition of either common carriers or contract carriers who utilize motor transport in interstate or foreign commerce to transport their property in furtherance of their business. In practice, the question usually presented to the Commission in the marginal case is whether the particular form of transportation should properly be classified as contract carriage for compensation or as private carriage. Since the latter category is defined in terms of the former, the Commission, in resolving the question whether a particular type of operation is subject to its licensing authority, must determine the extent to which the operation is characterized by the normal indicia of contract carriage. In other words, the private-carrier definition "applies only to the extent to which § 203(a)(15) [the contract carrier definition] does not." *Schenley Corporation* v. *United States*, 326 U.S. 432, 436.

Over the years, the question whether certain types of leasing arrangements result in contract carriage has become a matter of increasing concern to the Commission. Private carriers, of course, need not own their vehicles outright; they may lease them from their owners. Moreover, they may employ the owners to drive such leased vehicles without necessarily converting the operation into a contract-carriage operation. But it is also clear that owners of motor vehicles should not be permitted to avoid regulatory requirements merely through the device of formally

leasing their trucks and hiring themselves out as drivers if the substance of the arrangement is that they are providing a transportation service for hire. Accordingly, it has become necessary for the Commission to work out principles for determining in individual cases whether contract or private carriage is involved.

One factor which the Commission has invariably considered is whether the shipper has control and domination of the details of the transportation. Obviously, if the shipper does not exercise complete control over the transportation of its goods, it cannot even purport to be a private carrier.* But while the absence of such control negates any claim of private carriage, the converse is not true. Since a contract carrier's activities may be under the detailed control of a shipper to whom he has dedicated his operations without affecting his status as a contract carrier, the Commission, in situations where such control exists, must go further in order to ascertain whether the service, viewed in its totality, constitutes transportation for hire by the owner-operator or private carriage operated by the shipper in its own behalf. The determination of that matter is primarily for the Commission, for "where the question is one of specific application of a broad statutory term in a proceeding

* In this appeal, we do not challenge the district court's conclusion that the evidence did not warrant a finding that Oklahoma lacked full control of the details of the operation. Nor do we argue as to whether the court below gave too narrow a meaning to the Commission's control test. We assume, for present purposes, that the court below correctly applied that test as relating only to the operational aspects of the transportation.

in which the agency administering the statute must determine it initially, the reviewing court's function is limited" to the issue of whether the agency's "ultimate conclusions * * * have support in the record." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130–131.

As the district court stated in its opinion below (R. 20–21):

> In reaching its decision on the primary issue herein involved, the Commission utilized two tests: (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. Both tests have been approved by the courts [citations omitted].

The remainder of the opinion, however, is concerned only with the extent of Oklahoma's control and dominance over the details of the transportation operations carried out by the owner-operators. The court ultimately rested its decision solely on its conclusion that "[t]he Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. * * * The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles" (R. 23). Thus, the court has held in substance that owner-operators of motor vehicles are not engaged in transportation of property by motor vehicle for hire whenever they have subjected the details of their operations to the dominance and control of a particular

shipper. It is that aspect of the holding which we dispute.

As we shall urge below, the court's view of the distinction between private and contract carriage is inadequate. Whether a party falls within the category of "contract carrier" created by statute does not depend alone upon criteria of "control" or "domination." Rather, the determination must be made in the light of the ends to be fostered by economic regulation. In our view, the status of motor carriers depends critically upon the allocation of the financial burdens and risks involved in performing the service. We submit that the party who seeks to profit from transportation, *qua* transportation, and who bears the essential risks of engaging in it, should be treated as the person performing the carriage for purposes of determining whether the scheme of economic regulation applies. Otherwise, the potentialities for greatly expanding the area of private carriage might seriously impair the health of the nation's motor transportation system.

A. Bona fide private carriage is specifically exempted from the certification requirements of the Interstate Commerce Act in recognition of the various advantages which may be incident to true private carriage. There is no doubt that many firms prefer to provide their own transportation facilities in order to meet customer demands more readily and to serve customers at points not adequately served by regulated carriers.

There are, however, numerous inherent disadvantages in a shipper's undertaking private carriage—

disadvantages which provide a natural limitation on the extent of diversion of traffic from the regulated carriers. Investment in equipment is required, either by purchase or by leasing arrangement, and employment of drivers means increased payroll obligations. Doubtless, one of the greatest economic hazards of private carriage is "dead-heading"—the necessity of returning trucks empty to the point-of-origin when backhauls of raw materials are unavailable or unneeded.[9] Efficient utilization of both equipment and men requires close supervision and experienced management.[10] For a company without the necessary experience in the transportation business the risks of loss are substantial, particularly if, as is often the case, the volume of shipment is small or subject to significant fluctuation. Thus, so long as shippers can undertake private carriage only by assuming these risks and burdens, natural economic forces provide a limit upon the diversion of traffic from regulated carriers.

The statutory test was conceived in light of this natural limitation on bona fide private carriage. The original Motor Carrier Act of 1935 defined a private carrier (Section 203(a)(17), 49 U.S.C. 303(a)(17))

[9] Many "private" carriers originally sought to overcome this hazard by buying goods not used in the course of their primary business at the point of destination and reselling them at the point-of-origin. These so-called "buy and sell" practices were specifically condemned in the 1958 amendment to Section 203(c) of the Act. See p. 21, *infra*.

[10] It was, for example, because of Oklahoma's inability to prevent credit card abuses by its drivers and its fears that they would not properly maintain company-owned trucks, that it abandoned the use of its own trucks on long hauls and resorted to the leasing arrangements here involved.

as a person who was not a common or contract carrier—*i.e.*, not engaged in "transportation by motor vehicle * * * of * * * property * * * for compensation" (see 49 U.S.C. 303(a)(14) (common carrier); 49 U.S.C. 303(a)(15) (contract carrier)). In 1957, Congress added Section 203(c) (49 U.S.C. 303(c)) which expressly prohibits unlicensed operations by motor vehicles "for-hire." The further amendment of the new provision, in 1958, made it clear that private carriage was limited to transportation of goods in furtherance of the shipper's primary business enterprise and that private carriers could not make additional uses (see note 9, *supra*) of their equipment.[11] The question whether an operation is contract carriage (requiring a license) or private carriage (which does not) thus turns on whether a shipper is purchasing transportation for hire, or, instead, is separately acquiring the factors of which transportation is comprised (labor, equipment, fuel, etc.) and combining them into a functioning transportation facility which he operates in furtherance of his own, non-transportation interests.

[11] The 1957 and 1958 amendments were the direct outgrowth of congressional recognition of the general problems created by the steady increase in non-regulated private and exempt motor transportation, including much "motor carriage which although performed under the guise of private transportation is actually public transportation." (S. Rep. 1647 on Transportation Act of 1958, 85th Cong. 2d Sess., pp. 23–24). See also S. Rep. 1039 on Domestic Land and Water Transportation, 82d Cong. 1st Sess., pp. 20–21; H. Rep. 1922 on Transportation Act of 1958, 85th Cong. 2d Sess., p. 19; 69th annual Report, I.C.C., p. 99 (1955); 70th Annual Report, I.C.C., pp. 161–162 (1956); cf., *Gray Area of Transportation Operations*, I.C.C. Bureau of Transport Economics and Statistics (1960), pp. 108–109.

Under the leasing arrangements between Oklahoma and the owner-operators, the owner-operators provide the vehicles, drive them themselves (save in exceptional circumstances) and bear the entire risk of the investment of time and money. They are entitled to payment from Oklahoma only at a fixed cost per mile of transportation actually performed. The owner-operators thus bear the initial capital investment, all costs of operation and repair, the risk of breakdown and road delays and, perhaps most significant of all, the entire burden of non-utilization.[13] The only risk assumed by Oklahoma in the operation of the tractors [14] is that of liability to the public, which since it is passed on to insurers, ultimately amounts to no more than a rate adjustment between the company and the owner-operators (R. 157). The net result is that Oklahoma is buying transportation at a fixed cost per mile from the owner-operators and the latter bear the financial risk of engaging in transportation.

In form, of course, the owner-operators purport, by virtue of the separate leasing and collective bargaining agreements, to "sell" their labor and the use of their trucks. It is the economic reality behind the arrangements, however, not their form, which is

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[13] As already indicated (see Statement, *supra*, pp. 7–8), the services of the owner-operators and their trucks are not utilized every day by Oklahoma. The customary practice is for the owner-operator either to telephone the company or check the bulletin board to see if he is to ship out on a given day.

[14] Oklahoma does provide the trailers and bear the cost of cargo insurance, but that, of course, is typical of the contract carriage to which the Commission equated the operations here. See *Motor Haulage Co., Inc.* v. *United States*, 70 F. Supp. 17, affirmed, 331 U.S. 784.

crucial in determining the status of a carrier. The reality here is that the owner-operators assume all of the financial risks and bear all the variable costs, whereas Oklahoma is in the end required to pay only a predetermined fixed cost per mile for such transportation services as are *actually performed*. What Oklahoma pays for—and what the owner-operators provide—is a complete transportation service as such, not hours of labor or use of vehicles. The compensation of the owner-operator "employees", as contrasted with that of the regular Oklahoma drivers, is not related to hours of work. Moreover, there are none of the fixed charges characteristic of ordinary equipment leases, such as a daily "overhead" charge for the exclusive use of the vehicle during the term of the lease or a minimum mileage guarantee.[14]

The Commission, on the basis of these facts, held that, independently of any question of the extent of Oklahoma's control over the operating details of the transportation activities, the owner-operators were essentially engaged in contract carriage for Oklahoma. The decision below, by making the single element of operational control determinative, permits Oklahoma,

[14] In *Bridge Auto Renting Corporation* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850, the issue was whether the lessor of trucks (the lessor selected the drivers but they were paid by the lessee who had "exclusive control and direction over" them, 174 F. 2d at 735) was "engaged in the business of transporting property for hire" within the meaning of the Internal Revenue Code. The fact that the rental was usually a fixed amount every week for a stated average minimum weekly mileage, plus a stated amount for each mile in excess of the minimum, did not preclude a determination that the lessor was subject to the tax.

by the expedient of contracting for "control" of the operations, to obtain, at a fixed cost per mile, transportation not subject to the Commission's regulations, while at the same time leaving to the owner-operators the entire risk of loss, both of time and of money, arising from the exigencies of the transportation business.

The court below did not elaborate upon its conclusion (R. 22) that the owner-operators' asserted lack of control over the transportation of Oklahoma's goods negates "any presumption or inference of transportation for-hire." As we have argued above, control, though a relevant factor, is not dispositive. Indeed, the definition of a contract carrier, set out in 49 U.S.C. 303(a)(15), makes clear that "assignment" by the carrier "of motor vehicles for a continuing period of time to the exclusive use of each person served" or furnishing "transportation services designed to meet the distinct need of each individual customer" is the very essence of contract carriage by motor vehicle. The elements of Oklahoma's control or direction over the transportation activities of the owner-operators which the district court treated as conclusive proof that the latter were not engaged in contract carriage were in fact no more than "any shipper would normally exercise with respect to carrier service rendered to it by a carrier by motor vehicle, and especially a contract carrier by motor vehicle" (*Interstate Commerce Commission* v. *Cheesebrough*, 77 F. Supp. 441, 443). See *R.N.G. Commercial Auto Renters, Inc., Contract Carriage Application*, 73 M.C.C. 665, 669 ("Here [shipper's] foreman assigns the drivers to the vehicles, supervises them as to their duties, instructs

them as to the delivery of the merchandise, and requires them to report their deliveries and to file delivery tickets or receipts. Such practices, however, are natural concomitants of any contract carrier operation devoted exclusively to the needs of a particular shipper * * *"); *Keystone Transportation Company, Contract Carrier Application,* 19 M.C.C. 475, 498 (concurring opinion of Commissioner Eastman).

It would hardly be seriously contended that a contract carrier, owning its vehicles and providing drivers, would lose its status because, in contracting to perform transportation services for a particular shipper, it agreed that the customer would assume direction of the shipping operation. The only facts which give color to Oklahoma's claim to be a private carrier are that, in addition to exercising control over the transportation operations, it has purported to lease the equipment and to employ the drivers. This combination might, in different circumstances, lead to a conclusion that Oklahoma was in fact engaged in private carriage. It does not do so here where the Commission has found, upon clearly substantial evidence, that the particular leasing and employment arrangements leave the owner-operators in essentially the same position they would have been had they directly contracted to provide transportation service to Oklahoma at a fixed rate per mile.

B. There is nothing novel in the Commission's going beyond the factor of control in order to determine the actual status of the parties under the Interstate Commerce Act. Innumerable cases in this and the

lower courts—involving either the specific question whether a person must secure a license from the Commission as a common or contract carrier or analogous questions as to whether owner-operators are employees or independent contractors under the Social Security laws or "engaged in the business of transporting property for hire" under Section 3475 of the Internal Revenue Code (26 U.S.C. (1952 ed.) 3475)—have stressed that "[i]t is the total situation, including the risk undertaken, the control exercised, [and] the opportunity for profit from sound management" which determines the status of owner-operators of motor vehicles (*United States* v. *Silk*, 331 U.S. 704, 719). See *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (C.A. 10); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (C.A. 10), certiorari denied, 317 U.S. 650; *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (C.A. 5); *Bridge Auto Renting Corp.* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *John J. Casale, Inc.* v. *United States*, 86 F. Supp. 167 (C. Cls.); *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.). Compare *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50; *Thomson* v. *United States*, 321 U.S. 19.

Even in those cases decided solely or primarily on the basis of control and domination, the courts have recognized that, in some instances, the Commission's inquiry might have to go further. Thus in *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375, 380-381 (D. Minn.), a case cited by the court below as one approving the control analysis (R. 21), the court stated:

> The decisive question to be determined is how much service, if any, in addition to the vehicle alone, may be rendered to the shipper-lessee by the owner-lessor before the borderline between renting and leasing a truck for private carriage is crossed and the broad and all-inclusive field of transportation occupied.
>
> * * * * * * * * * * * * Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier.

See, also, *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Company*, 78 F. Supp. 13 (D. Minn.).

The view which we urge carries out the precept that remedial legislation is to be read "in the light of the mischief to be corrected and the end to be attained" *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259. The motor carrier provisions of Part II of the Interstate Commerce Act are remedial with exceptions thereto "to extend only to carriers plainly within [their] terms," *McDonald* v. *Thompson*, 305 U.S. 263, 266. See *Schenley Corp.* v. *United States*, 326 U.S. 432; cf., *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, *Bartels* v. *Birmingham*, 332 U.S. 126, 130.

A close analogy to the present case is found in this Court's decision in *Harrison* v. *Greyvan Lines, Inc.*,

331 U.S. 704 (decided together with *United States* v. *Silk, supra*). There, the Court, concluding that certain truckmen were independent contractors, rather than "employees," within the meaning of the Social Security Act of 1935, expressly rejected any suggestion that "the so-called 'common-law control' test [illegible] conclusive" (331 U.S. at 720; dissenting opinion [16]). To be sure, the *Greyvan* case involved a different statute; and status, for purposes of different statutes, may not be the same. But it is significant, in making the comparison, that the broad policies underlying the Social Security Act were such as to favor strongly the conclusion, if warranted by the facts, that the truckers were "employees".

The leasing arrangements involved in the *Greyvan* case were strikingly similar to those here. The owner-operators were required to haul exclusively for the lessee, to pay all the ordinary expenses of the operation, to drive their trucks personally at all times or be present on the truck when a competent relief driver was driving, and to follow all rules, regulations and instructions of the company, including directions as to where and when to load freight. The company maintained a staff of dispatchers who issued orders for the owner-operators' movements, although not the routes to be followed. However, the lessors were paid on the basis of a percentage of the applicable tariff charged and, of course, the incentive was to take the shortest possible route. The drivers reported their positions to the company at regular in-

[16] On this point, the majority and the dissenting opinions were in full agreement.

tervals. Cargo insurance was paid by the company. All permits, certificates, and franchises necessary to the operation of the leased trucks were to be obtained at company expense. A contract between the lessee and a local of the Teamsters' Union was applicable to the owner-operators as well as to a staff of full-time salaried drivers who admittedly were employees. Operation of the leased vehicles and of those belonging to the company and driven by its own drivers was carried out in the same manner.

Looking to the "economic reality" of the situation (331 U.S. at 713), this Court stated (p. 716) "that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision." The Court noted that the owner-operators "hire their own assistants [if any], own their trucks, pay their own expenses, with minor exceptions, and depend on their own initiative, judgment and energy for a large part of their success (*ibid.*)."[16] And it concluded (p. 719): "[W]here the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. * * * It is the total situation, including the risk undertaken, the control exercised, the opportunity for

[16] With respect to workmen in the *Silk* case, who merely unloaded coal from trucks, the Court, in holding them employees, said (331 U.S. at 717–718): "They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools."

profit from sound management, that marks these driver-owners as independent contractors."

Appellees suggest, however (Drum Motion to Affirm, pp. 13–14), that this Court's recent decision in *Teamsters Union* v. *Oliver,* 358 U.S. 283, stands for the proposition that owner-operators, such as those involved here and in the *Greyvan* case, are "employees" of the lessee and hence, by necessary implication, not themselves contract carriers. In the *Teamsters* case, the courts of Ohio had held invalid, under the State's antitrust laws, a clause in a collective bargaining agreement between the Teamsters and a group of interstate motor carriers. This clause established minimum rate scales which a carrier would pay when a motor vehicle was leased to a carrier by an owner who was to drive his vehicle in the carrier's service. Holding that the arrangement directly related to a subject of mandatory collective bargaining covered by the National Labor Relations Act, this Court declared that the Ohio antitrust statute must give way. The decision holds at most, that where an owner of a motor vehicle leases it to a carrier which simultaneously enters into a union contract purporting to "employ" the lessor as the driver of his truck, both the owner-operator and the carrier are estopped from contending that the former is in fact an independent-contractor outside the coverage of the Labor Act. Nothing in the Court's opinion indicates, one way or the other, whether the owner-operators in that case were performing any carrier functions which might warrant regulation under the Interstate Commerce Act. In-

deed, the majority opinion in this Court does not in terms discuss the question whether the owner-operators were independent contractors or employees. In failing to do so, it may well have agreed with the opinion of the Ohio trial court which held (Record, No. 49, Oct. Term 1958, pp. 168, 246), that the status of the owner-operators was immaterial and that the real issue was whether the subject matter of the disputed provision of the collective bargaining agreement was, in the words of the Ohio court, a "remote and indirect approach to the subject of wages" or, as this Court subsequently determined, "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." See 358 U.S. at 294.

We emphasize, finally, that most members of the shipping public depend upon the regulated carriers for motor transportation and that the Commission is charged with the duty of protecting the economic stability of those who assume the burdens and responsibilities of public carriers. The Commission believes that if exemptions are not carefully confined to their proper scope, the flow of traffic away from regulated carriers will increase significantly and the economic problems of those carriers will be correspondingly aggravated. Shippers are, of course, free in all events to assume the financial and other risks involved in the transportation business and to become private carriers. But those risks, it is believed, tend to limit private carriage to the more or less exceptional case in which it offers important efficiencies of operation. The decision below permits the shipper to buy a transporta-

tion service virtually identical with that which regulated carriers characteristically provide without patronizing a member of the regulated industry and without assuming the financial risks of private carriage. There is an obvious incentive for others to follow this course since the unregulated competition which exists among owner-operators frequently enables the shipper to obtain from that source rates which are cut below those of regulated carriers. For these reasons, we believe that the type of enforcement which the Commission has attempted in this case bears an important relationship to the maintenance of a sound national transportation system.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint.

ARCHIBALD COX,
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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 23.

UNITED STATES OF AMERICA, *et al.*,

Appellants,

vs.

HENRY E. DRUM, *et al.*

No. 24.

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

Appellant,

vs.

HENRY E. DRUM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR WEATHER-SEAL, INC.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR WEATHER-SEAL, INC.

STATEMENT.

This action arose upon a petition filed in the District Court for the Western District of Oklahoma to enjoin and review a decision of the Interstate Commerce Commission issued in the case of Oklahoma Furniture Manufacturing Company, et al.—Investigation of Operations; No. MC C-2143, decided April 22, 1959, and reported in Volume 13, Federal Carriers Cases, published by The Commerce

Clearing House, at paragraph 34,602 (page 40,494). Weather-Seal, Inc. was given leave to intervene on behalf of the petitioner. The district court granted the injunction and its opinion is reported at 193 F. S. 275.

QUESTION.

Contrary to the question posed by appellants, Weather-Seal, Inc. would present the question as follows: Is the bona fide lease of motor vehicles by a private carrier and the hiring of the lessor of such equipment as a bona fide employee of the lessee to drive the leased equipment contrary to law?

PRESENTATION OF QUESTION.

At the time of the hearing before the Interstate Commerce Commission Albert Douglas, an inspector for the Interstate Commerce Commission, was called as a witness. He stated that the purpose of the investigation was to investigate leases of the Oklahoma Furniture Manufacturing Company (T-99).* During the course of his interrogation Witness Douglas was asked questions concerning "vehicle condition reports," which is a report a carrier must make in compliance with the safety regulations of the Interstate Commerce Commission. Counsel for the Oklahoma Furniture Manufacturing Company objected to the question on the ground that there was no issue as to safety of operations. Counsel for the Interstate Commerce Commission agreed that the only issue before the Examiner was one of control over the operation by the carrier and that there was no issue with respect to compliance with the rules and regulations of the Commission (T-95). Witness

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* All references refer to the Transcript of Record filed in the United States Supreme Court.

Douglas later testified that the investigation was started "on account of some of the road inspections that we made had indicated that the owner was also driving the equipment" (T-99).

That the findings and conclusions of the Interstate Commerce Commission fully indicate the only issue in the case was whether or not the driving of the vehicles by the lessor was contrary to law is clearly shown by the decision of the Interstate Commerce Commission. We quote from the majority opinion of the Commission:

> (T-155) "* * * Even if each owner-operator should be considered to be a bona-fide employee of the Company with respect to his driving duties, he does not lose his status as an independent contractor with respect to the equipment and his own services as a driver cannot be considered to take from him and give to the Company such control as would overcome the presumption stated in the *Church* case, *supra* * * * There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists. * * *
>
> * * * * *
>
> (T-160) "* * * Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for-hire, but once the owner-operators enter into the comprehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part, * * *
>
> * * * * *
>
> (T-161) "* * * It is noted, however, that the circumstances here are such that the described operations would not constitute a bar to our finding the

owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy. * * *"

and from the dissenting opinion of Commissioner Webb:

(T-163) "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. * * *

(T-164) "In addition to its ominous implications, the report contains a few that are anomalous. For example, if Norris drives Shinn's tractor and Shinn drives Norris,' both would probably be held to be enengaged in private carriage. And this would be true even though all other aspects of the transportation service were identical to the arrangements condemned in this proceeding. Also, if a company driver owning no equipment drives Shinn's tractor and Shinn drives a company tractor, neither would be regarded as performing a for-hire service."

(T-165) "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation."

There can be no other reason for the Commission to find as they did since they also found that (1) there was no attempt at subterfuge; (2) the lease agreements, standing by themselves, were proper; and (3) the employment contracts, standing alone, were also proper. Nevertheless,

they proceeded from these three premises to find that when a lessor-driver drives his own truck it is illegal.

The question as presented by the Government, which attempts to remove the question from one of control to one of finances, was not the question considered by the Interstate Commerce Commission. The statements made by the Government are not supported by the record. The Shipper did not transfer the risk of loss due to transportation to the drivers of their leased equipment. The shipper was required to pay a fixed charge per mile, regardless of how much furniture was transported out-bound and regardless of whether or not they had any return freight. (T-109.)

ARGUMENT.

The Interstate Commerce Commission stated the question with which they were concerned as follows:

> "* * * We are here concerned with whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly performed by it as private carriage. In *H. B. Church Truck Service Co., Common Carrier Application*, 27 M. C. C. 191, it was stated:
>
> "'* * * in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of controlling the transportation service*, as for example, if the equipment were operated by the shipper's employee.' (Emphasis added.)" (T-153-4.)

The court will note that the sole issue as stated by the Interstate Commerce Commission was whether or not the

shipper had *exclusive right* to control the transportation (emphasis, the Commission's). The court will further note that the Commission conceded that the hiring contract, standing alone, was bona fide and, further, that the Commission conceded that the lease arrangement was bona fide (T-160). The Supreme Court will further note the absence of any claim, absence of any finding, or even the absence of any discussion by the Interstate Commerce Commission that the arrangement, or any part of the arrangement, was a subterfuge or a planned evasion of the law. On the contrary, the Commission agreed that the arrangement was open and above-board.

Failing to discover any lack of control in the employer, the Commission then proceeded with the following startling and dangerous statement:

> "There is present whenever the owner-operator drives his own equipment the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." (T-155.)

By this statement, the Interstate Commerce Commission converted a reasonable rule for the determination of whether a purported private transportation service was indeed private transportation to an irrebuttable presumption by, in effect, removing the following last sentence from the rule propounded in the *Church* case, to-wit:

> "This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of controlling the transportation service*, as for example, if the equipment was operated by the shipper's employee." (Commission's emphasis.)

Commissioner Webb noted the startling effects of such a statement, (and recognizing that common and contract carriers, at least heretofore, have had the right to hire owner-drivers) with the following comment:

"No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary." (T-163-4.)

Commissioner Webb further noted that the result was a complete departure from the rule of the *Church* case while claiming to be following its precept.

"The report, while holding up the single element of 'status' as the conclusive factor in determining who has the right to control and direct, is inconsistent in citing the *Church* case, *supra*, and the *R. N. G.* case, *supra*. The latter case contains the following statement:

" 'The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between applicant (lessor) and Gaylord (lessee), including particularly the actual practices in the conduct of the operation. No one element or circumstance is by itself conclusive. See *H. B. Church Truck Service Co. Com. Car. Application*, 27 M. C. C. 191.' " (T-164.)

The district court, in its opinion, after reviewing the reasoning of the Interstate Commerce Commission, stated the situation as follows:

"The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the Church case by the following declaration:

" 'There is present, whenever the owner-operator drives his own equipment, the right and power of

> the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.' " (T-22.)

The district court then repudiated the irrebutable rule propounded by the Commission and returned to the rule of the *Church* case by finding that:

> "The record before the Commission discloses that there was more than sufficient evidence to rebut any presumption or inference of transportation for-hire. The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith. The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves." (T-22.)

The position taken by the Interstate Commerce Commission completely overlooks and ignores the fact that the Congress of the United States has divided all motor carriers into three categories and given the Interstate Commerce Commission not only the authority, but the duty to regulate such carriers in conformity with the declared transportation policy of the United States. These three categories are, of course, common carriers, contract carriers and private carriers. All three are defined by the Congress in Section 203 of the Motor Carrier Act, USC Title 49, Section 303. Sub-section 17 of the foregoing section defines private carriers as follows:

> "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of

sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

The authority which the Interstate Commerce Commission has over private carriers is set forth in Section 204 of the Motor Carrier Act, USC, Title 49, Section 304. It is therein provided that the Commission shall establish reasonable requirements to promote safety of operations and to prescribe qualifications and maximum hours of service of employees and standards of equipment. In accordance with the authority granted, the Commission has established such safety regulations, which are applicable to all carriers who may be regulated by the Commission.

There is no question but that the Interstate Commerce Commission was unduly concerned with its assumed responsibility of protecting common and contract carriers. For this assumption, we note the following statement of Commissioner Webb in his dissenting opinion.

> "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation." (T-165.)

We can well understand that such should be the expected position of the regulated carriers and we find this position stated in the brief of the Regular Common Carrier Conference, at page 9, as follows:

> "Both Congress and the Interstate Commerce Commission, in recognition of that principle, have expressed deep concern about the threat to regulated transportation posed by various arrangements which seek the guise of private carriage * * *"

We were shocked that this was also the position of the Government in their brief before this Court and as set forth in their brief at page 12.

We submit that there is not one word in the Acts of Congress which both create the Interstate Commerce Commission and provide for its jurisdiction and duties which sets one class of carriers above another. Actually, in the words of one court, they are equal and must be treated equal by the Commission. See *Taylor v. ICC*, 209 F. 2d 353, Certiorari Denied 74 S. Ct. 677, wherein the court commented on this subject as follows:

> "The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a weasel word in this connection. The policy of the Act declares as follows:
>
> " 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each*; * * *' (Emphasis supplied.) Transportation Act of 1940, Par. 1, 54 Stat. 899, 49 U. S. C. A. note preceding section 301.
>
> "One of the modes of transportation subject to the Act, as having 'inherent advantages' is that by private carriers of their own property. This is stated in 303 (17) as follows:
>
> " '(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is

for the purpose of sale, lease, rent, or bailment or in furtherance of any commercial enterprise.'

"We think that in interpreting this paragraph and paragraph (15) providing for 'contract carriers' later considered, there is no rule of interpretation more liberal for one than the other."

The intention of Congress is very clearly set forth in the opinion by the court in *Brooks Transportation Company, et al. vs. United States*, 93 F. S. 517, Aff. 340 U. S. 925, 95 Law Ed. 668. This is recognized as one of the leading cases on the subject of private carriers. In this case, in which the courts affirmed a decision of the Interstate Commerce Commission relative to private carriage, the court quoted at length from the Congressional Record with respect to the intention of Congress as to the right of a manufacturer to transport its own products. Unquestionably, anyone in business has a right to make arrangements for the transportation of its own products and need not use the services of either of the other two regulated carriers.

Another illuminating case on the right of a private carrier is *Interstate Commerce Commission vs. Woodall Food Products Co., Inc.*, 112 F. S. 639, Aff. 207 F. 2d 517. In this case the Commission had said that the various arrangements for the transportation of poultry were a "round robin hocus-pocus and a subterfuge." The court in overruling the Commission said that the transportation was that of a legitimate private carrier since "he deals in a commodity he owns and it was his primary business function." In this case the carrier owned no vehicles and carried all of its products on leased equipment. The report is silent as to what arrangements there were with respect to driving the equipment.

From an examination of the record as a whole, made before the Interstate Commerce Commission commencing

at page 37 of the Transcript, it is clear that the complete control was absolutely exercised by this shipper. It is equally clear from a reading of the opinion by the majority of the Interstate Commerce Commission that no matter what this shipper would have done, its motivations would have been questioned and an irrational inference drawn from the true facts. It is clear from a reading of the record that the following is true: The leases were entered into for a purely economic and business reason (T-41-42). The owners of the leased trucks were hired as drivers and covered by a union contract, which union contract covers all of the employees of the Oklahoma Furniture Manufacturing Company (T-42-86). The respondent drivers received all of the benefits that any other employee of the company received, to-wit: Workmen's Compensation, vacations, social security, and income tax was withheld from their earnings (T-101). They received separate checks for their earnings as drivers and for the lease of their equipment (T-46-64). The employer chose the route the drivers were required to follow and supervised the repair and maintenance of the leased equipment (T-50-57). The drivers who formerly drove company-owned equipment and now drove their own leased equipment received the exact same instructions from the company and had the same control exercised over their employment (T-57-8, 62, 64, 100-1). The drivers were changed from truck to truck at the direction of the employer (T-58, 61, 65, 80, 101). The employees who drove company-owned tractors took them home, just as the employees who operated their own tractors took them home (T-60, 101). It was the employer's policy to assign the same driver to the same equipment, whether the company owned it, or whether it was leased (T-69, 76, 101). It was the Interstate Commerce Commission which urged the employer

to make the respondents employees (T-89-90, 91). The drivers considered themselves Company employees (T-64). The equipment was used solely in the service of the Oklahoma Furniture Manufacturing Company and was never used for the transportation of the property of any other person, firm or individual (T-79).

The facts, as developed in this record, do not support the Government in the principle repeated throughout its brief that the arrangement complained of was illegal because it assured Oklahoma Furniture Manufacturing Company of a fixed and definite cost for transportation—see the Government's brief, page 4, 8, 13, 14, 19, 20, 22, 23, and 29. In fact, at page 22 of its brief the Government inferred that Oklahoma Furniture Manufacturing Company was freed of the risk of deadheading (operating with an empty vehicle) in that at that point in its brief the Government stated that the arrangement permitted Oklahoma Furniture Manufacturing Company to operate "at a fixed cost per mile of transportation actually performed."

The facts are diametrically opposed to this position in that the lessors of the equipment received the same mileage for the use of their tractors regardless of the amount of freight loaded in the trailer. The lease provided for a fixed rental per mile regardless of whether there was any freight, one pound, or a full load on the trailer (T-109). There is not a scintilla of evidence, or claim of evidence in the record that the lease was not followed to the letter. The drivers, likewise, were paid for each mile driven regardless of whether or not there was any freight in the trailer at all. Again, there is not a scintilla of evidence or claim that the drivers were not paid as stated.

The Public Utilities Commission of Ohio, operating under statutes and rules very similar to those under which the Interstate Commerce Commission operates, and also

apparently operating under somewhat the same psychology, came to the same conclusion as the Interstate Commerce Commission did in this case. Its decision was reversed by the Ohio Supreme Court in *Van Meter v. PUCO*, 165 O. S. 391, 135 N. E. 2d 848. We quote syllabus 2 thereof:

> "Where a driver-owner while driving his truck in carrying property is in every respect a servant of one to whom he has leased the truck, such driver-owner cannot be, by reason of the lease of such truck and the rendering of any services provided for in such lease and by reason of such driving, 'engaged in the business of (contract) carriage of * * * property * * * or of providing or furnishing such transportation service' within the meaning of those words as used in Section 4923.02, Revised Code." (In Ohio the statutes have historically referred to "contract" carriers as "private" carriers. So that in the opinion by the Ohio Supreme Court what is understood to be a contract carrier is referred to as a "private" motor carrier. The Legislature recently has attempted to clarify this by using the terms jointly in Amended Section 4923.02 of the Revised Code of Ohio.)

We quote from the court's opinion:

> "Without a driver, a truck cannot move. For this reason, the furnishing and providing for a monetary consideration of a truck, of the maintenance and repair therefor, of insurance with respect to its operation, and of fuel, oil, other materials, equipment and accessories necessary for its efficient operation, without furnishing or providing a driver, cannot be an engaging 'in the business of * * * carriage of * * * property, or both, or of providing or furnishing such transportation service, for hire,' within the meaning of those statutory words. See *Motor Haulage Co. v. United States*, D. C. 70 F. Supp. 17, affirmed without opinion, 331 U. S. 784, 67 S. Ct. 1205, 91 L. Ed. 1815.

See also annotation, 7 A. L. R. 2d 456, 468 et seq. Where, however, a driver is also furnished, then there *may* be an engaging in such business. See 7 A. L. R. *2d supra*, 472. *However, whether there is* will depend in a particular instance upon the relationship between the driver of the truck and the one to whom the truck and driver are furnished; and what that relationship is will necessarily depend upon the facts. If the driver, while driving, is 'in every respect * * * a servant of' the one to whom the truck is leased (as stipulated in the instant case), then his operation of the truck is part of the business of the lessee and not an engaging in business by the driver or someone else. In such an instance, it cannot be said that even a driver-owner of the truck is '*engaged in the business* of private carriage of * * * property * * * or of providing or furnishing such transportation service' within the meaning of the statutory words hereinbefore quoted. See 7 A. L. R. 2d *supra*, 470, 471. If anyone is engaged in such business, it is the master who is in control of the mode and manner of operating the truck. It may be noted that all parties apparently concede that one, who is carrying his own property or providing or furnishing transportation for it, is not engaged in such 'business * * * for hire' within the meaning of the statutory words" (Court's emphasis).

CONCLUSION.

It is respectfully submitted:

1. That a private motor carrier is one recognized by the Congress of the United States and entitled to equal treatment by the Interstate Commerce Commission, the governmental authority authorized and directed to regulate and control the various forms of transportation in the United States;

2. That no preference should be shown between the various forms of motor carrier transportation, to-wit: Common carriers, contract carriers and private carriers;

3. That all forms of motor carriers must supervise and control the operation of all motor vehicles operated by them in the conduct of their motor carrier business;

4. That a private carrier has a right to lease equipment and to employ the lessor, or any other person, to operate the leased vehicle so long as the carrier exercises supervision and control over the equipment and its operator;

5. That the findings and conclusions of the district court should be affirmed.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
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HENRY E. DRUM, ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR HENRY E. DRUM, ET AL.

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September, 1961.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR HENRY E. DRUM, ET AL.

STATEMENT

These Appellees feel that the Court is entitled to a more definitive statement of the case than is contained in the brief of Appellants.

Oklahoma Furniture Manufacturing Company is incorporated under the laws of the State of Delaware, but its principal place of business and only plant are located at Guthrie, Oklahoma (Tr. 40). Appellee will hereafter be referred to as "Oklahoma." The individual appellees are all citizens and residents of the State of Oklahoma and of the Western District thereof. Where reference is made to these individuals as a group, "long haul drivers" will be used.

Oklahoma's primary business is the manufacturing of low cost furniture. This category of furniture is the most competitive of the industry (Tr. 40, 82). The price of the furniture and the delivery time are of prime importance. Oklahoma's customers are located in all states, but mostly in the states located east of the Rocky Mountains (Tr. 40). Oklahoma has always delivered the merchandise sold. There is no question, but that the Oklahoma's operation is interstate commerce, all parties agree that it is.

Likewise, there is no question but that this transportation of the furniture sold is an incident of the primary business of the Company. No identifiable charge is made for transportation (Tr. 92, 93). The furniture is sold at a price depending upon zones. The price within a zone depends upon competition (Tr. 83). In some instances, the prices are cheaper for more remote zones (Tr. 83). Another factor in computing zone prices is whether raw materials can be returned to the plant from the zone, with its resulting savings in expense (Tr. 84). The cost of transportation is treated as an element of production cost (Tr. 92).

The undesirability of this business to established carriers is attested by the fact that no individual carrier intervened in the "investigation" before the ICC or before the District Court. Oklahoma's products are light and bulky (Tr. 84). On isolated occasions the Company has shipped furniture by common carriage. The objections to this procedure are: (1) the furniture must be packaged or crated, (2) the carriage takes too long, (3) the cargo must often be transshipped, and (4) the transportation charges are passed along to the customer (Tr. 84, 85).

Objection (1) above is extremely important. The cost of crating furniture is constant and not dependent upon the value of the furniture crated. Expensive furniture may be crated for the same amount as inexpensive furniture. In the Company's case, the crating would be a large percentage of the value of the furniture and the Company could not remain competitive (Tr. 84, 93). The record indicates that only one carrier having authority to deal in uncrated furniture, services Guthrie, and this carrier goes only west (Tr. 93). Under Oklahoma's present operation, the furniture is transported in trailers specially designed for transporting furniture, and exclusively owned by the Company (Tr. 84). Padding is used rather than crating (Tr. 84, 93) and the Oklahoma is a self insurer of the cargo.

The equipment Oklahoma utilized for this transportation at the time of the hearing was 26 trailers, 17 tractors and two bob-tails (Tr. 76, 77). Initially, all equipment was owned by Oklahoma (Tr. 41). In the late 1930's and again in 1951, Oklahoma found that its drivers had been defrauding Oklahoma by padding gasoline tickets and through

misuse of other credit arrangements maintained by Oklahoma for the operation (Tr. 41, 81). At each occurrence, Oklahoma found that all but one driver had been guilty of breach of trust (Tr. 82).

In 1952, the Company decided to alter the existing operation to prevent future breaches of trust and the accompanying cost (Tr. 41, R. 67). Additionally, Oklahoma had been having bad experiences with accidents, exorbitant repair bills for minor repairs and keeping the equipment properly maintained (Tr. 42). In order to solve all of these practical problems Oklahoma decided to lease the tractor units from owner-drivers, paying rental by units of use, the owners to pay for the cost of oil and gas. If the driver paid the gasoline bills and maintenance costs, the Company would not be overcharged (Tr. 42). If the driver owned the equipment, he would be more careful to properly maintain it and see that it was not involved in accidents (Tr. 42).

A lease was drawn and submitted to the Interstate Commerce Commission representative in Oklahoma City, Oklahoma, who made suggestions and objections which were complied with (Tr. 92). Thereafter, this lease was put into effect between Oklahoma and approximately 14 owner-drivers. The lease arrangements provided only part of the tractors used; the remaining tractors were still owned by Oklahoma as well as all trailers and other equipment required for the operation.

The initial lease agreement, shown as Exhibit 3 (Tr. 114 to 119), was replaced in 1956 by a second lease agree-

ment. This second lease agreement is marked Exhibit 4 (Tr. 121 to 127).

Prior to July of 1957, the Supreme Court of Arkansas determined that the 1956 lease was illegal for operation in the State of Arkansas, and the Supreme Court of the United States denied *certiorari*. Thereupon and at the insistence of the Company a conference was held between Mr. R. H. Walker, the Company's managing officer, the Company's counsel, and the Bureau of Inquiry, and Compliance of the Interstate Commerce Commission at Fort Worth, Texas. At this conference the Bureau gave no specific suggestions, other than to state that since the drivers were not employees of the Company, then the Company did not have control over the tractors (Tr. 89, 90). Thereafter, in July of 1957, Oklahoma changed its method of operation. The present operation is reflected by the lease agreement put into effect in July of 1957, and also a contract with United Furniture Workers of America A.F.L.-C.I.O., Local No. 272. These two instruments define the present operation of the Company.

The following is a summary of the material provisions of the present lease agreement which is shown as Exhibit "2" (Tr. 109 to 113):

> The Company leases a tractor from the lessor, paying rental by unit of use. The lessor i paid 10 cents per mile for single axle pull, and 11 cents per mile for tandem trailer pull, with 3 cents additional for full loads on the back haul.
>
> The Company covenants that the tractor will be driven by an employee of the Company who is properly qualified and physically fit. The lessor pays the

cost of operation, including oil, gas, grease, and cost of parts, and also for Oklahoma commercial license plates.

The lessee agrees to maintain the vehicle at all times in first class operational condition and in compliance with state and federal regulations. The Company has the sole right of direction and use of the vehicle, and covenants that such use will be lawful, and that the tractor will be used in transporting only property belonging to the Company, and will not be subleased to any other person or corporation.

The lessor agrees to mortgage or encumber the vehicle only with the *written* consent of the Company. The Company is not responsible for wear, tear, depreciation, or loss to the leased equipment, and the lessor is not responsible to the Company for loss to Company's equipment or goods transported.

The Company carries public liability and property damage insurance upon the leased vehicle but does not carry collision, upset, fire, or theft insurance on the vehicle so leased. The lease is for a period of one year and is automatically renewed unless cancelled. The lease may be cancelled by either party upon thirty days' written notice and may be cancelled by the Company for breach on the part of the lessor.

On July 15, 1957, Oklahoma entered into a supplemental agreement to the existing contract with A.F.L.-C.I.O. United Furniture Workers of America, Local No. 272. The basic contract, which was plant-wide covering all employees, was dated December 14, 1956. The basic contract and the July 15th supplement are shown in Exhibit "5" (Tr. 128 to 143).

Under this union contract the long haul drivers received every benefit and Oklahoma incurred every obligation as was existing between Oklahoma and all of its plant employees. The following are either obligations of Oklahoma or benefits to the employee drivers under the union contract (which are not intended to be exclusive):

Oklahoma recognized the Union as the bargaining agency for the drivers and agreed to provide a check-off system for the payment of union dues. Oklahoma obligated itself on lay-offs and promotions to work on a seniority basis. Oklahoma agreed to fire a driver only for cause and, if requested, to furnish a written report of the reasons for action. Oklahoma obligated itself to provide a paid vacation for the drivers. The drivers received death benefits, military service benefits and leave of absence benefits.

The supplementary contract made the basic Union contract inapplicable to long haul drivers only where it did not fit the long haul driver's situation. This included maximum hours of work, minimum hours of work for vacation benefits, and pay per hour. Where the basic contract was amended provisions to achieve a like result were substituted.

In actual practice Oklahoma has always scrupulously followed its written agreements with the lessors. The I.C.C. has never contended that Oklahoma is guilty of subterfuge or evasion (Tr. 86). The I.C.C. has never suggested that Oklahoma has not provided all information required and all cooperation desired (Tr. 86, 87). The record conclusively shows this good faith.

The equipment and personnel used by Oklahoma for the transportation of furniture are a part of the Company's trucking department (Tr. 77), which is supervised by Mr. Barney Kennedy (Tr. 66). The personnel in the trucking department at the time of the hearing consisted of Mr. Kennedy, 17 drivers, and one inspection or truck man (Tr. 77, 66). The equipment consisted of 26 trailers, 11 leased tractors, 6 owned tractors, and 2 bob-tails (Tr. 77).

The drivers may be separated for discussion into two classes: (1) long haul drivers, and (2) short haul drivers. The long haul drivers are those who are by business practice assigned to the leased tractors and deliver to points more remote from Guthrie (Tr. 73, 74). The short haul drivers deliver to nearer points (Tr. 73). Both classes are paid according to the Union contract; 5 and 6 cents per mile for the long haul drivers, and $50.00 per week and 2 cents per mile for the short haul drivers (Exhibit "5", Tr. 128-143). The difference in the rate of pay arises from the fact that long haul drivers are able to amass a great deal of mileage during a week, but short haul drivers are not (Tr. 74). The short haul drivers were formerly paid only on a mileage basis (Tr. 63, 64), but the Company has changed the method of pay to provide adequate wages for the short haul drivers (Tr. 74).

Oklahoma exercises exactly the same control over the long haul and short haul drivers (Tr. 57, 58, 76). All drivers are given a route book showing the routes to be taken in making deliveries (Tr. 72). All drivers are instructed as to what to do in emergency situations (Tr. 51).

All drivers are required to undergo periodic physical examinations in compliance with I.C.C. regulations. All drivers are required to complete and give to Oklahoma drivers' logs and vehicle condition reports as required by the I.C.C. (Tr. 56, 94-98).

The Shipping Superintendent schedules all trips and all drivers receive assignments from him (Tr. 69). The assignments are brought to the attention of the drivers by a posting on a bulletin board (Tr. 49, 69) or by telephone or order of the superintendent. The trailers are loaded so that the last delivery to come off of the trailer is placed in the nose of the trailer (Tr. 71). In this manner, Oklahoma controls the order of towns to which deliveries are made (Tr. 71).

The assignments of drivers to particular tractors are done by the Trucking Superintendent. It is Company policy that one driver will be assigned to a particular tractor unless otherwise directed by the Superintendent (Tr. 75, 76, 82). This policy is because Oklahoma has found through experience that in this manner the equipment is treated better and there are fewer accidents (Tr. 70). This policy is subject to modification where business sense so dictates. Drivers are frequently interchanged by order of the Superintendent to where drivers of leased tractors drive other leased tractors or owned tactors and drivers of owned tractors drive other owned tractors or leased tractors (Tr. 58, 59, 61, 75). The long haul drivers recognize that they must drive the tractor assigned: "I'll drive anything out of there they will bill me on" (Tr. 65).

Where a short haul driver is assigned to drive a leased tractor, then he is paid the customary $50.00 per week and two cents a mile. The short haul driver must pay the gasoline and oil costs, but the lessor of the tractor reimburses him (Tr. 80). Where a long haul driver is assigned to drive a Company owned tractor, he is paid the customary 5 and 6 cents per mile.

Oklahoma deducts withholding tax from the wages of all drivers. Oklahoma withholds the employees' portion of social security tax and pays the employer's portion of social security tax for all drivers (Tr. 101). Oklahoma provides workman's compensation insurance for each driver (Tr. 101). Oklahoma provides and pays for all public liability (personal injury and property damage) insurance (Tr. 85). All drivers are allowed to use the tractors assigned to them for transportation between work and home (Tr. 60, 101). The full risk of loss to cargo is upon the Company; no driver signs for cargo.

Each driver is paid weekly for the previous week's wage. In the case of long haul drivers, they are paid weekly for the rental of the tractor according to the lease agreements. The checks for wages and rental are separate (Tr. 46, 64). The Union Contract is plant wide, but not a closed shop. Some long haul drivers are members of the Union (Tr. 48) and some are not (Tr. 54).

SUMMARY OF ARGUMENT

The District Court examined all the facts and circumstances surrounding the lease agreement, and the contract with the labor union together with the actual practices

thereunder. The District Court stated the basic issue to be: who is transporting the goods in question? The District Court answered that question by the two tests advanced by the Commission in its report. That court concluded that Oklahoma had the right to and did actually exercise direction, control and domination of the transportation of its products and the equipment and personnel concerned therewith, and; that the drivers in substance were not engaged in the business of for-hire transportation. Appellants are not entitled to assume that the District Court did not consider the facts which they contend are "economic reality."

Appellants United States and Interstate Commerce Commission allow the possibility that an owner may lease his tractor and also drive that tractor for the lessee. Appellant Regular Common Carrier Conference argues that owner-operators may never work for private carriers without being contract carriers. To this extent their respective theories of the case are in conflict.

Under the National Transportation Policy, neither the definition of contract carriage nor the definition of private carriage is entitled to a more liberal construction. A private carrier is included within the act and is not an exemption thereto.

Appellants United States and Interstate Commerce Commission have omitted many "economic realities" in this case. Oklahoma: has the risk of dead-heading equipment where back hauls of raw materials are not available; risk of improper loading and routing; risk of loss to cargo, public liability; pays for workmen's compensation; pays

for all administrative expense; pays employee's portion of social security and; owns all trailers and six of seventeen tractors.

In order to support the "economic reality" test the Appellants rely upon *United States* v. *Silk and Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704. That case treats the scope of the word "employee" as defined in the Social Security Act of 1935. The Motor Carrier Act does not use the word "employee" in any material place. The requirement of employee driver was placed upon private carriers through Commission decisions and Commission rulings. That word should be held to mean precisely what the Commission intended it to mean, not more in this case only.

Harrison v. *Greyvan Lines, supra* is authority for the proposition that the Court should look to all facts and circumstances to determine whether this is contract or private carriage.

Because private carriage is defined by statute in terms of contract carriage, Appellants reason that whatever contract carriers do must by definition be excluded from private carriage. Appellants reserve to the Commission the right to state "normal indicia" of contract carriage and thereby reserve to the Commission the power to expand or contract the statutory definition of private carriage. The practical effect of this misconstruction of the Motor Carrier Act is to discount evidence of control, risk of loss to cargo, liability for tort and ownership of equipment by the carrier.

There is a Commission finding that Oklahoma's operation has been in good faith. Appellants have never contended that there is subterfuge involved in the arrangements. The substance complies with the form and Oklahoma is a private carrier and the drivers are its employees.

ARGUMENT

Initially, we would like to restate our position as contained in our brief to this Court on Motion to Dismiss or in the Alternative, Motion to Affirm. The District Court stated the question to be determined as follows:

> "The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in Lamb v. Interstate Commerce Commission, 10 Cir., 259 F.2d 358, put it, 'Simply stated it is who was transporting the goods in question,' that is, whose operations in interstate transportation were these, those of the Company or those of the owner operators?" (Tr. 17).

The District Court acknowledged the two tests of the Commission by restating them as follows:

> "* * * (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire" (Tr. 20, 21).

In support of the first test the court cited: *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, D. Minn.,

78 F. Supp. 13; *Interstate Commerce Commission* v. *Gannoe*, W.D. Pa., 100 F. Supp. 790; *Motor Haulage Co.* v. *United States*, E.D. N.Y., 70 F. Supp. 17, *affirmed* 331 U.S. 784; *United States* v. *LaTuff Transfer Service*, D.Minn., 95 F. Supp. 375. In support of the second test the court cited: *Georgia Truck System, Inc.* v. *Interstate Commerce Commission*, 5th Cir., 123 F.2d 210; *Lamb* v. *Interstate Commerce Commission, supra*, in quotation; and *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 10th Cir., 128 F.2d 155, *cert. den.* 317 U.S. 650.

The District Court pointed out that the Commission had used the decision *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, for its position but had in reality repudiated that decision in not obeying the following quotation from that case:

> "The Commission in that decision further stated:
>
> " 'The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No element of such facts and circumstances is by itself controlling'." (Tr. 22.)

Based upon all the facts and circumstances of the operation and actual practices thereunder, including method of payment for equipment lease and wages for driving which were spelled out (Tr. 13, 14 and 15), the court concluded:

> "In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here

> is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators." (Tr. 23).

As to the first Commission test, the court said:

> "The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith." (Tr. 22).

As to the second Commission test, the court said:

> "The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves." (Tr. 22).

THE THEORIES OF APPELLANTS UNITED STATES AND INTERSTATE COMMERCE AND APPELLANT REGULAR COMMON CARRIER CONFERENCE ARE IN BASIC CONFLICT

The Commission in its report sought to disqualify owner-operators from working for private carriers. No other result was possible in view of the Commission's conclusion that owner-operators always retained the right to defeat the required lessee control.[1] Appellants United States and Inter-

[1] That conclusion was: "There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists" (Tr. 155). In referring to that quoted language, Commissioner Webb in his dissenting opinion said: "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission" (Tr. 163, 164)

state Commerce Commission in their brief at page 16 now contradict the Commission's report by stating that of course an owner may lease his equipment to a private carrier and drive that equipment as an employee.

To the contrary, Appellant in Case No. 24, Regular Common Carrier Conference, argues that one who furnishes both instrumentalities of transportation (truck and driver) must be in substance engaged in transportation for-hire. That conclusion is argued in the Common Carrier's brief under the heading "The Mistaken Rationale of the Court Below" pages 11 to 15.

Plainly if the Common Carrier's position is the law, the District Court erred. However, that position is contrary to the Commission ruling in *Watson Manufacturing Co., Inc., Common Carrier Application*, 51 M.C.C. 223. As Commissioner Webb said in his dissenting opinion in the case at bar, such a rule would be "a legally unsupportable sentence of economic excommunication" (Tr. 165). The opinion of the District Court refutes the arguments of Regular Common Carrier Conference.

Appellants, United States and Interstate Commerce Commission, charge that the District Court erred in failing to construe the Motor Carrier Act in the light of its purpose which Appellants argue is "the ends to be fostered by economic regulation." The stated National Transportation Policy is set forth in the Historical Note preceding Title 49, U.S.C.A., Section 301.

The statutory definitions of contract and private carriers are as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph [14] of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Title 49 U.S.C.A. 303(a)(15).

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Title 49 U.S.C.A. 303(a)(17).

Under the National Transportation Policy, neither definition is entitled to a more liberal construction. *Taylor* v. *Interstate Commerce Commission*, 209 F.2d 353. The definition of private carrier is not included under "Vehicles excepted from operation of law."

Appellants, United States and Interstate Commerce Commission, at page 12 of their brief argue that the engaging in transportation for-hire is the hallmark of both contract and common carriage. Consideration of whether the operation is common carriage may be dismissed because the goods of Oklahoma only, have been transported. (The

Commission compared this operation to contract carriage, Tr. 156.) Each private carrier is one person whose transportation serves a distinct need of that private carrier. Where the private carrier leases equipment, he has the exclusive use of the equipment for the continuing period of the lease. The question is whether the owner-operators furnish a for-hire transportation service to Oklahoma or whether Oklahoma furnishes a transportation service to itself. The question is as the District Court put it: "* * * whose operations in interstate transportation were these, those of the Company or those of the owner-operators?" (Tr. 17).

Appellants, United States and Interstate Commerce Commission, relate "economic reality" to economic regulation. He shall leave the burden of establishing that the National Transportation Policy may be reduced to "the ends to be fostered by economic regulation" to those appellants and pass on to a discussion of the "economic reality" of this case.

APPELLANTS HAVE NOT SHOWN ALL OF THE ECONOMIC REALITIES INVOLVED IN THIS OPERATION

On page twenty of their brief, Appellants, United States and Interstate Commerce Commission, state that the greatest economic hazard of private carriage is "dead-heading"—the necessity of returning a truck empty to the point of origin when backhauls of raw materials are unavailable or unneeded. We agree. Oklahoma bears this major hazard called "dead-heading." The lessor under each

lease is paid mileage rental both going and returning on a trip (Tr. 121). Where backhauls are involved the lessor receives an additional 3¢ per mile to compensate for additional fuel consumed and wear and tear on the leased equipment (Tr. 121). The driver is paid a total of 5¢ per mile going from Guthrie and returning to Guthrie. Where a backhaul is made, the driver is paid an additional 1¢ per mile on the backhaul bringing the total to 6¢ per mile (Tr. 143). Additional weight on the backhaul and additional time make his job more difficult and he should be paid an additional amount.

Oklahoma can sell its products more cheaply in areas where there is a likelihood of a backhaul of raw materials (Tr. 83, 84). This is one of the reasons Oklahoma sells its products priced on a zonal basis sometimes inversely related to the distance of the zone from Guthrie, Oklahoma (Tr. 83).

This leads to another major economic hazard of private carriage borne by Oklahoma—outbound movements. Scheduling, loading, and routing is done by Oklahoma. If an outbound movement is mistimed, a return of raw materials may be missed. Even if properly timed, selection of the wrong type of equipment (weight, dimension, etc.) for the outbound movement may preclude the return of the available raw materials. If the furniture is inefficiently loaded or improperly routed, Oklahoma suffers the waste. All of these risks are borne by Oklahoma and treated as expenses of production.

Oklahoma bears the complete risk of loss to goods damaged in transit. Where new furniture is being transported

uncrated, that risk is substantial. Oklahoma pays liability insurance and its assets constitute a fund for the payment of any judgment in excess of insurance limits. Oklahoma also pays for workmen's compensation insurance covering the employees in the loading and shipping department. Under Oklahoma law, awards under the Workmen's Compensation Act are against the employer first and insurance carrier second. Title 85, Section 11, Okla. Stat. 1951, as amended. Therefore, the assets of the corporation are a fund for the payment of awards should the insurance carrier be not able to respond. Oklahoma pays for all administrative expense. Oklahoma pays employer's portion of social security. Oklahoma owns outright all twenty-six trailers, six of seventeen tractors and the two bob-tails utilized in this operation.

Appellants' argument of risk of non-utilization of equipment or non-use of drivers is not impressive when it is considered the Commission examined four drivers, the Shipping Superintendent and the Vice-President of Oklahoma and failed to ask whether the situation had ever presented itself. We suggest that the economic reality to a driver who isn't receiving pay is the same regardless of whether (1) he is paid by the hour and has been laid off for lack of work, or (2) he is paid on a piece-work basis and there is no work. Power equipment such as tractors have a unit use life. They become worn out with use. If a tractor is not being used it is not creating expense and it is not wearing out. Payment of rental on units of use is the only fair method of payment. It is also to be noted that the

Commission did not ask any of the drivers whether there was a profit or loss experienced in the lease arrangement.

Appellants' contention that the owner-operators are engaged in transportation for-hire because they may make a profit or loss from the lease of equipment due to cost of fuel, oil and maintenance, was considered and overruled in the case of *Earle* v. *Bobbler*, 180 F.2d 1016.

In support of the "economic reality" test, Appellants rely upon the cases of *United States* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704. Those cases, reported together, are concerned with whether persons are "employees" as defined under the Social Security Act of 1935. The word "employee" is not used in the Motor Carrier Act insofar as material to this case. The Interstate Commerce Commission made that status important in the case of *H. B. Church Truck Service Co., Common Carrier Application, supra*, as shown in the following quotation:

> "This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee." 27 MCC at 196.

The Commission also made the status important in the following ruling:

> "LEASING REGULATIONS
>
> "Ruling No. 103, November 23, 1956.
>
> "Section 207.1 Applicability.
>
> "Question: Do the regulations apply to the leasing of equipment to private carriers or shippers by a person not an authorized carrier?

> "Answer: No. The regulations have no application to such leasing arrangements. For such an arrangement to be proper the leased vehicle must be transferred to the shipper's possession and be operated under the shipper's complete direction and control by the shipper's own driver, with the shipper responsible to the public in case of accident and responsible to the Commission for compliance with the safety regulations. If this is not done, the arrangement would result in unlawful transportation for compensation by the owner of the vehicle. Authorized carriers may not lease vehicles to private carriers or shippers except under the conditions specified in 207.6 of the regulations."

The District Court found that Oklahoma had the right to and did actually control, direct and dominate (1) the transportation of its products and (2) the equipment concerned therewith, and (3) the personnel concerned therewith (Tr. 22). The District Court further found:

> "The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves" (Tr. 22).

If the Commission requires that the driver be an employee so that the private carrier will have direction, control, and domination over the transportation, that requirement has been satisfied. It is plain that the Commission is attempting in this case to add the requirement that the driver or owner-operator divest himself of all risk and be paid only on a fixed salary or by the hour for his driving and an amount certain for rental of equipment. The Motor Carrier Act makes no such requirement. At any rate, the District Court

found that these owner-operators were employees and not engaged in the business of transportation for-hire.

It is interesting to note that in this case Appellants argue that direction, control and domination of the transportation service does not answer a second test of economic risks and burdens. In the case of *Machinery Haulers Association, et al.* v. *Agricultural Commodity Service*, No. MC-C-2488, — M.C.C. —, decided May 3, 1961, the Commission, Division 1, held that the driver of a vehicle operated on behalf of a farm cooperative must not retain any "interests." Specifically, Division 1, held:

> "In Summary, we conclude that, in order for the motor vehicles to be controlled and operated by a cooperative association within the meaning of the partial exemption of section 203(b)(5):
>
> (1) The motor vehicle either must be owned by the cooperative association, or it must be used and operated by such association as if it were, in fact, owned by the cooperative; and
>
> (2) The driver of the vehicle must be a bona fide employee of the cooperative association, and must possess no duties, obligations, responsibilities or interests inconsistent with its obligations to that association." (MC-C-2488 at page 38.)

Title 49, U.S.C.A., Sec. 303(b), provides:

> "Vehicles excepted from operation of law
>
> (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equip-

> ment shall be construed to include * * * (5) motor vehicles *controlled and operated* by a cooperative association as defined in the agricultural Marketing Act, as amended, or by a federation of such cooperative association, if such federation possesses no greater powers or purposes than cooperative associations so defined; * * *." (Emphasis supplied.)

In the *Machinery Haulers Association* decision, *supra*, the Commission holds that "controlled and operated" embraces financial interests. In the case at bar, Appellants contend that a finding of control, direction and domination does not embrace these financial interests.

If Appellants cite the case of *Harrison* v. *Greyvan Lines, Inc., supra,* to overthrow the District Court's finding that the drivers are employees, we point out the following distinctions between that case and the one at bar: In the *Harrison* case the owner-operators worked under contracts whereby they furnished all equipment and were paid between 50 and 52 per cent of Greyvan's "tariff." In the case at bar the lessors lease only part of the needed equipment to Oklahoma and are paid a rental, not a percentage of the profit Oklahoma makes (if any) on the transportation. The owner-operators in the *Harrison* case were free to seek freight and their efforts in that regard produced income to them. The drivers in the case at bar are not free to seek freight, but are assigned to drive particular shipments by Oklahoma. Also, in the case at bar, Oklahoma retains the right to hire and fire drivers without regard to the lease agreement. Presumably in the *Harrison* case, the driver and equipment came together with the contract. In the *Harrison*

case there was a manual purporting to instruct the owner-operators as to their conduct in the performance of their duties which manual was not followed. In the case at bar, Appellants admit that Oklahoma has and exercises this control. Additionally, in the *Harrison* case, *supra*, the owner-operators could hire employees. In the case at bar, the drivers are themselves employees and cannot hire employees. In the case at bar there is no subterfuge. The lease agreement is strictly followed. Oklahoma furnishes the tractor to the driver, not vice-versa.

In the *Harrison* case, *supra*, this Court pointed out:

> "The Social Security Agency and the Courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." 331 U.S. at 716.

The appellants, United States and Interstate Commerce Commission, do not seek a determination based upon all the facts and circumstances. In that respect, *Harrison* v. *Greyvan Lines, Inc., supra*, is authority against the contention of those appellants.

APPELLANTS UNITED STATES AND INTERSTATE COMMERCE COMMISSION MISCONSTRUE THE MOTOR CARRIER ACT

Appellants, United States and Interstate Commerce Commission, state at page 16 of their brief, that the definition of private carriage:

> " 'applies only to the extent to which § 204(a)(15) (the contract carrier definition) does not.' Shenley Corporation v. United States, 326 U.S. 432, 436."

We agree with that statement, but not with the use the Appellants make of it. That use is set forth also on page 16 of the brief. Appellants state that because private carriage is defined in terms of contract carriage, the Commission must first determine the extent to which the operation is characterized by the *normal indicia* of contract carriage. Appellants cite *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, for the proposition that a court cannot reverse the Commission's decision on the meaning of a broad statutory term where the Commission's ultimate conclusion has support in the record.

The distinction between the *N.L.R.B.* v. *Hearst Publications* case, *supra*, and the one at bar is that in the *Hearst Publications* case Congress left the determination of the meaning of "employee" as used in the National Labor Relations Act to the N.L.R.B. In the case at bar, Congress did not leave the determination of the meaning of contract carrier or private carrier to the Commission. Congress defined both terms. See *Contract Steel Carriers* v. *United States*, 128 F. Supp. 25, *affirmed, United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409. The Commission in the report and the Appellants now attempt to graft "normal indicia" onto the statutory definition of contract carrier. Because a private carrier is what a contract carrier by statute is not, the Commission in the report and Appellants in their brief reason that whatever contract carriers do may not be considered as an element of private carriage.

Illustrations are as follows: (1) Appellants attempt to reduce the finding of direction, control and domination of the transportation, the equipment and the personnel, to supervision over the drivers in the details of hauling. The "control" as reduced (See footnote 8 in brief of Appellants U.S. and ICC) is compared to contract carrier situations where the contract carrier allows the shipper to supervise his (the contract carrier's) drivers (Tr. 157). (2) The Commission labeled Oklahoma's ownership of all twenty-six trailers contract carriage by the "truckaway method." (Tr. 156, see footnote No. 5 to the report.) (3) The Commission refused to consider that Oklahoma had risk of loss and damage to the cargo because there is no requirement in the Motor Carrier Act that contract carriers provide such protection (Tr. 157). (4) In a footnote, the Commission called Oklahoma's obligation to provide a paid vacation for the drivers as provided in the union contract, deferred compensation. (5) The Commission refused to consider that Oklahoma had risk of public liability for negligence because that risk could be passed on to insurers and was little more or less than a rate adjustment (Tr. 157). There was no evidence of a relationship between the premiums paid and any "rate". Insurance policies have amount and coverage limitations. Policies of insurance are partial protection only; the risk is the question.

The Commission committed other errors in considering its second test. The Commission held that Oklahoma's requiring physicians' certificates on drivers, reports on vehicle condition and drivers' logs, pursuant to Commission safety regulations, was of no importance in deter-

mining the person responsible for getting and keeping those items (Tr. 160). However, the Commission supposes itself to have some control over men and equipment by virtue of requiring these reports. Oklahoma also controls drivers and equipment through these reports. The Commission never considered these requirements when discussing control.

The Commission thus compared each aspect of this operation to what some contract carriers do. The Commission never considered all aspects at one time to ask if there was a contract carrier anywhere with such few attributes of transportation service. Commissioner Webb in his dissenting opinion at Tr. 162 stated:

> "It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents."

The Commission in its report and the Appellants in this case attempt to amend the statutory definition of private carrier at will.

THERE IS NO SUBTERFUGE INVOLVED IN THIS OPERATION

Appellants have never contended that Oklahoma or the drivers are involved in a subterfuge arrangement. The Commission in its report recognized that the operation was being carried out in good faith by Oklahoma in an attempt to conform to true private carriage (Tr. 160). The absence of subterfuge is a major distinction between the case at

bar and the following authority relied upon by Appellants: *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F.2d 155 (C.A. 10); *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F.2d 210 (C.A. 5); *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.); *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.).

The case of *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn.), is distinguishable on each of the ten essential facts stated at 78 F. Supp. 19, which facts convinced that court that transportation for-hire was being performed.

The lease of equipment is proper and does not result in transportation for-hire. *Motor Haulage Co., Inc.* v. *United States, et al.*, 70 F. Supp. 17, *affirmed*, 331 U.S. 784; *U-Drive It Company* v. *Pennsylvania Inc., Common Carrier Application*, 23 M.C.C. 799). The use of the owner of the tractor as a driver is proper. *Earle* v. *Babler, supra; Watson Manufacturing Co., Inc., Common Carrier Application, supra; Van Meter* v. *PUCO* (Ohio), 165 O.S. 391, 135 N.E.2d 848.

Each of the last cited three cases is exactly in point. If an owner-operator leasing equipment and driving for a fully regulated carrier under Commission rules is an employee and not a contract carrier, then certainly the drivers in this case must also be employees and not eleven different and distinct contract carriers. Compare *American Trucking Assos.* v. *United States*, 344 U.S. 298; *Local 24 of I. B. of T., C., W. & H. of America* v. *Oliver, et al.*, 358 U.S. 283.

CONCLUSION

We respectfully submit that the decision of the District Court of the United States for the Western District of Oklahoma, entered in this cause should be affirmed.

Respectfully submitted,

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